TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 462.

THE NEW YORK LIFE INSURANCE COMPANY, APPELLANT,

vs.

WILLIAM C. STATHAM AND PARMELIA A. DUDLEY, FORMERLY PARMELIA A. STATHAM.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED AUGUST 6, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 462.

THE NEW YORK LIFE-INSURANCE COMPANY, APPELLANT,

vs.

WILLIAM C. STATHAM AND PARMELIA A. DUDLEY, FORMERLY PARMELIA A. STATHAM.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

INDEX.

	Original.	Print.
Caption to record	1	1
Transcript from Hinds chancery court	2	1
Bill of complaint	2	1
Exhibit A to bill, (policy of insurance)	15	5
Subpœna	19	6
Demurrer	21	7
Order for transfer to chancery court for second district of Hinds County	30	10
List of papers	30	10
Certificate of clerk	31	11
Order chancery court Hinds County	31	11
Decree chancery court sustaining demurrer and dismissing bill	32	11
Petition for appeal to high court	32	11
Appeal bond	33	12
Mandate from supreme court of Mississippi	35	12
Deposition of A. S. Brown	37	13
Order court for leave to file answer	52	18
Answer of Livingston Mims	52	18
Petition of New York Life-Insurance Company for transfer to United States court	55	19
Affidavit of Morris Franklin, president	58	20
Bond for transfer	59	20
Decree transferring cause to United States court	63	22
Answer of New York Life-Insurance Company	67	23
Joint answer of Humphreys and Mims	77	26
Letter of Morris Franklin to A. S. Brown filed as evidence	80	27
Agreement	80	27
Answer of W. C. Statham and Parmelia A. Dudley to cross-bill	81	28

	Original.	Print.
Cost-bill chancery court Hinds County	87	30
Certificates to record from chancery court	88	30
Motion to strike record from files	90	31
Order overruling motion	90	31
Motion to set cause for hearing	91	32
Time for taking testimony extended	92	32
Further extension of time to take testimony	92	32
Set for hearing	93	32
Set for hearing	93	33
Remanded to rules with leave to take testimony	94	33
Remanded to rules with leave to take testimony	94	33
Set for final hearing	95	33
Deposition of Morris Franklin	95	33
Decree and order reference to commissioner	103	36
Report of commissioner	104	37
Final decree	106	37
Order granting appeal	108	38
Appeal bond	108	38
Clerk's certificate	116	41

1 Pleas had at a term of the circuit court of the United States for the southern district of Mississippi, begun and held in the court-room thereof, in the city of Jackson, in said State and district, on the first Monday, being the third day of November, in the year of our Lord one thousand eight hundred and seventy-three. Present, the Hon. Robert A. Hill, district judge of the United States for the districts of Mississippi, F. Brannigan, esq., district attorney of the United States for said southern district of Mississippi, Leroy S. Brown, United States marshal for said district, and Ge'rge T. Swann, clerk of said court.

WILLIAM CRAWFORD STATHAM AND PERMELIA A. Dudley, compl'ts, *vs.* THE NEW YORK LIFE-INSURANCE COMPANY, J. G. Milligan, Benjamin G. Humphreys, and Livingston Mims, def'ts.	N. S. 179. Chancery.

Be it remembered that heretofore, to wit, on the 4th day of
2 November, in the year of our Lord 1872, came the said defendants and filed in the office of the clerk of the circuit court of the United States for the southern district of Mississippi, at Jackson, a transcript of the record of the proceedings had in this cause in the chancery court of Hinds County, in said State of Mississippi, duly certified under the signature of the clerk and seal of said chancery court, which said transcript of record, with the proceedings, orders, and final decree of our said circuit court of the United States had and rendered thereon, are in the words and figures following, to wit:

Transcript of record from the chancery court of Hinds County.

To the honorable John Watts, judge in chancery, at Jackson, for the 1st district of Hinds County:

The bill of complaint of William Crawford Statham and Permelia A. Dudley, formerly Statham, residing in the State of Mississippi, complainants, against J. G. Milligan, Benjamin G. Humphreys, and Livingston Mims, citizens of the State of Mississippi, residing at
3 Jackson, in the county of Hinds, in said State, and the New York Life-Insurance Company, a foreign corporation created under and by virtue of the laws of the State of New York and resident in the State of New York, and whose domicil and principal place of business is in the city of New York, in said State. Humbly complaining, your orators, William Crawford Statham and Permelia A. Dudley, respectfully show that the defendant, the New York Life-Insurance Company, is a foreign corporation duly chartered and created under and by virtue of the laws of the State of New York, and whose domicil and residence and principal place of business is in the city of New York and said State of New York. Said company was chartered for the purpose of taking risks and making insurance upon lives.

Your orators further state, that on the 8th day of December, in the year 1851, Mrs. Lucy B. Statham, now dec'd, and then the wife of Dr. Augustine Davis Statham, insured the life of her husband, the said Dr. Augustine Davis Statham, in said company, receiving from said company a policy of insurance by which said company agreed and
4 undertook and did assure the life of the said Augustine Davis

Statham for the sole use of the said Mrs. Lucy B. Statham, in the amount of $5,000, for the term of the natural life of said Augustine Davis Statham, commencing on the 8th day of December, 1851, at noon. Your orators here file said original policy of insurance, marked "Exhibit A," and pray that the same may be considered as a part of this bill. The consideration of said policy of insurance *over* an annual premium of $208.50 to be paid by the said Mrs. Lucy B. Statham during the continuance of said policy, and to be paid as follows, to wit, $208.50 in cash, which was paid on the 8th day of December, in the year 1851, when said policy was issued, and $208.50 to be paid annually thereafter on the 8th day of December in every year during the continuance of said policy. By said policy the said company promised and agreed to pay to the said Mrs. Lucy B. Statham, or her legal representatives, the said sum of $5,000 within sixty days after due notice and proof of death of the said Augustine Davis Statham; or in case of the death of the said Mrs. Lucy B. Statham before the decease of the said
5 Augustine Davis Statham, the amount of said insurance was to be paid after death to her children, for their use, or to their guardian, if under age, within sixty days after due notice and proof of the death of the said Augustine B. Statham, deducting therefrom all notes for premiums on the said policy unpaid at that time.

Your orators further state that it was also understood and agreed, as a part of said policy, in case the said Mrs. Lucy B. Statham should not pay the premiums as aforesaid on or before the several days mentioned in said policy for the payment thereof, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and that said policy should cease and determine.

Your orators further state, that on the 8th day of December, in the year 1851, when the said insurance was effected and said policy was issued, the said Lucy B. Statham and Augustine Davis Statham were citizens of the State of Mississippi and resided in the town of Granada and county of Yalobusha, in said State, and they each continued
6 to be and remain citizens of the said State of Mississippi, and residents of the said town of Grenada in the county of Yalobusha, until their respective deaths, which occurred as follows, to wit. the said Mrs. Lucy B. Statham departed this life on the day of October, in the year 1856, and the said Augustine Davis Statham departed this life on or about the 20th day of July, in the year 1862.

Your orators further state, that on the 8th day of December, in the year 1851, one A. S. Brown, a citizen of the State of Mississippi, residing in the town of Grenada aforesaid, was the agent of said insurance company, and he continued to act as the agent of said company in the State of Mississippi from that time forward until the commencement of the civil war in 1861 between the United States and the States called the Confederate States of America, and at no time was his agency specially revoked by said company; but, after said war was declared to exist, the said Brown, who was a citizen and resident of the State of Mississippi, declined to act as such agent upon the alleged ground that it was unlawful for him to do so.

7 Your orators state that the premiums due and payable on and by said policy of insurance were regularly and duly paid, in the manner and at the time stipulated in said policy, from the 8th day of December, 1851, until and including the premiums due on the 8th day of December, 1860. These payments were all paid to the said A. S.

Brown, the agent of said company, who furnished the receipts of the said company for the same.

Your orators further state, that on the 9th day of January, 1861, the State of Mississippi by a convention passed which is known as the ordinance of secession, and soon thereafter, to wit, in the month of April, in the year 1861, a civil war was declared to exist, and did in fact exist, between the United States on the one part and certain States thereof leagued together under the name of the Confederate States of America, on *thereafter* part, among which States, so called the Confederate States of America, the State of Mississippi was one. The civil war so begun as aforesaid in April, 1861, continued to exist and continued from that time until the year 1866, and during all that time the legal repre-
8 sentatives of said Lucy B. Statham, your orators, were citizens and residents of the State of Mississippi, and the said New York Life-Insurance Company was during the whole of that time a citizen and resident of the State of New York, having its domicile and *and* place of business in the State of New York.

Your orators further state that, in consequence of the existence of said civil war, all intercourse and traffic of every kind and all commercial dealings between citizens and residents of the State of Mississippi and citizens and residents of the State of New York was unlawful and prohibited by the laws of the United States.

Your orators further state that the laws of the United States prohibited and declared it unlawful to remit money by citizens of the State of Mississippi to citizens of the State of New York, and in consequence of such prohibition and laws it was unlawful for the said Mrs. Lucy B. Statham and her representatives, and she and they were prohibited from paying to the said New York Life-Insurance Company the premiums on said policy of insurance falling due on the 8th day of December, 1861, and in consequence of such prohibition such payment could not be made.

Your orators further state that it was unlawful for the said life-
9 insurance company, and it was prohibited from receiving payment of the premium on said policy of insurance falling due on the 8th day of December, 1861, and in consequence of such prohibition to pay and to receive said premium the same could not be paid. Nevertheless, your orators state that the representatives of the said Mrs. Lucy B. Statham did every act and made every effort that they could in order to make payment of said premium falling due on the 8th day of December, 1861; and to that end, on and before the said 8th day of December, 1861, they offered to pay said premium to the said A. S. Brown, the agent of said company, to whom all previous payments had been made. But the said A. S. Brown declined to receive said payment, alleging as a reason for refusing that it was unlawful to receive it; that in consequence of the war he could not communicate with said life-insurance company nor could it communicate with him, and besides that he had not been furnished by said company with proper receipts to be used on receiving said payment.

Your orators further state that before any other premium on said
10 policy became the said Augustine Davis Statham, the assured, departed this life, on or about the 20th day of July, 1862, and thereby the said insurance company became liable to pay the whole sum of $5,000, the amount of the policy of insurance.

Your orators state that, soon after the termination of the war, your orators called on said insurance company and gave due notice and furnished proof of the death of said Augustine Davis Statham, and called or a settlement and payment of the amount due on said policy. But

the said insurance company denied their liability on said policy, and claimed and insisted that, by reason of the non-payment of the premium falling due on the 8th day of December, 1861, the said policy had become forfeited and said company released from liability. Your orators offered to deduct from the amount of said policy the amount of said premium so falling due on the 8th day of December, 1861, and also to deduct therefrom all notes for premiums on said policy unpaid at the death of said Augustine Davis Statham. But said insurance re-
11 fused to adjust said liability on these terms, or to pay said insurance-money, denying entirely their liability to pay because of the alleged forfeiture of the policy aforesaid.

Your orators deny that said policy has ever been forfeited, or that non-payment of the premium due on the 8th day of December, 1861, worked a forfeiture of said policy. That non-payment was not caused by any neglect on the part of Mrs. Statham or her representatives, but the same was not paid because it had been rendered illegal to pay it, and its payment was prohibited by the United States, and the receipt of it was also illegal and prohibited by the United States. The said insurance was prohibited by law from receiving, and Mrs. Statham and her representatives were prohibited by law from paying said premium, and your orators are advised that under such circumstances a court of equity will not permit the non-payment of said premium to work a forfeiture of the policy. Your orators further state that they have been informed, and believe, that the said Benjamin G. Humphreys, Livingston Mims, and J. G. Milligan are the agents of said company.
12 The said Humphreys, Mims, and Milligan are citizens of the State of Mississippi, and reside in Jackson, in the 1st district of the county of Hinds, in said State. They also have in their hands, in the State of Mississippi, as your orators have been informed, and therefore charges, money, choses in action, and other property and effects belonging to said New York Life-Insurance Company, which money, choses in action, &c., they will pay over and deliver to said company unless enjoined by this honorable court.

Your orators are advised that they have a right in equity to attach and seize the money, choses in action, &c., in the hands of said Humphreys, Milligan, and Mims, and to have a sufficient amount thereof, as may be necessary, appropriated to pay the amount due to your orators on the policy of insurance aforesaid. More than sixty days have elapsed since due notice and proof of the death of said Augustine Davis Statham was furnished to said insurance company. Your orators are the sole surviving children of Mrs. Lucy B. Statham, and as such sole surviving children are entitled to the amount on said policy by
13 said insurance company, and they had well hoped that the same would be paid to them, but said company has denied all liability to pay, and have refused to pay the same, upon the sole ground that the said policy was forfeited by the non-payment of the premium as aforesaid, all of which is contrary to equity, &c.

In tender consideration, &c., and as your orators are remdiless, &c., they pray that the said New York Life-Insurance Company and the said Benjamin G. Humphreys, Livingston Mims, and J. G. Milligan, be made defendants to this bill; that subpœna issue and they be compelled to appear and answer, &c. Your orators also pray for an attachment and writ of sequestration to issue to seize and sequestrate the money, choses in action, property, &c., in the hands of said Humphreys, Milligan, and Mims belonging to said insurance company, and to appropriate and apply so much thereof as may be sufficient and requisite to pay the

amount due to your orators by said company. Your orators here offer to deduct from the amount of said policy the premium that was due and not paid on the 8th day of December, 1861; and also all notes for premiums due on said policy at the death of the said Augustine
14 Davis Statham.

Your orators pray for an account of the amount due on said policy after making all deductions and credits proper and equitable in the premises, and that a decree may be rendered against said insurance company in favor of your orators for the amount so ascertained to be due; or, if mistaken in the relief asked, your orators pray for such other further and additional relief as in equity is just and proper, and as in duty, &c.

W. AND J. R. AND W. YERGER, JR.,
Sols.

STATE OF MISSISSIPPI, *Hinds County:*

This day James R. Yerger, agent and attorney of complainants, personally appeared before me, clerk of the circuit and chancery courts of said county, and made oath that the New York Life-Insurance Company, one of the defendants in the foregoing suit, is a foreign corporation and *have resident* of the State of Mississippi, and having its legal domicil and residence in the State of New York, and in the city of New York, and that the post-office of said insurance company is in the city of New York. Affiant asks for an order of publication, &c., as
15 required by law.

J. R. YERGER.

Sworn to and subscribed before me this 3d day of Sept., 1868.
L. A. LINDSEY, *Clerk.*

Filed with Ex. A, and subpœnas issued 3rd Sept., 1868.
L. A. LINDSEY, *Clerk.*

THE NEW YORK LIFE-INSURANCE COMPANY.

No. 7779.

Annual premium, $208. 50.

Sum insured, $5,000.

This policy of insurance witnesseth, that the New York Life-Insurance Company, in consideration of the sum of two hundred and eight dollars and fifty cents, to them in hand paid by Mrs. Lucy B. Statham, wife of Augustine Davis Statham, and of the annual premium of two hundred and eight dollars and fifty cents, to be paid on the eighth day of December in every year during the continuance of this policy, do assure the life of Augustine Davis Statham, physician, of G'enada, in the county of Yalobusha, State of Mississippi, for the sole use of the said Mrs. Lucy B. Statham, in the amount of five thousand dollars, for the term of his natural life, commencing on the eighth day of Dec., 1861, at noon. And the said company do hereby promise and agree, to and
16 with the said assured, her executors, administrators, and assigns, well and truly to pay, or cause to be paid, the said sum insured to the said Mrs. Lucy B. Statham, or her legal representatives, within sixty days after due notice and proof of the death of the said Augustine Davis Statham; and in case of the death of the said Mrs. Lucy B. Statham before the decease of the said Augustine Davis Statham, the amount of the said insurance shall be payable after her death to her children, for their use, or to their guardian, if under age, within sixty days after due notice and proof of the death of the aforesaid Augustine Davis Statham as aforesaid, deducting therefrom all notes for premiums of this policy unpaid at that time; provided, always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case

the said Augustine D. Statham shall, without the consent of this company previously obtained and endorsed upon this policy, pass beyond the settled limits of the United States that lie east of the Rocky Mountains, (excepting into the settled limits of the British provinces of the two Canadas, Nova Scotia, or New Brunswick,) or shall, without such previous consent thus endorsed, visit or reside in those parts of the United States which lie south of the southern boundaries of the State of Virginia and Kentucky, between the first of July and the first of November, or shall without such previous consent thus endorsed enter into any military or naval service whatever, (the militia not in actual service excepted,) or in case he shall die in or in consequence of a duel, or by the hands of justice, or in the known violation of any law of the United States, or of any State or country, or in case his death shall be caused by intoxicating drink or opium, this policy shall be null and void.

17

And it is also understood and agreed to be the true intent and meaning hereof, that if the declaration made by the said Augustine Davis Statham, and bearing date the twenty-fifth day of November, 1851, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void; or, in case the said Mrs. Lucy B. Statham shall not pay the said premiums on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine.

18

N. B.—If assigned, notice to be given the company.

In witness whereof, the said New York Life-Insurance Company have, by their president and actuary, signed and delivered this contract this eighth day of Dec., one thousand eight hundred and fifty-one.

MORRIS FRANKLIN, *President.*

PLINY FREEMAN, *Actuary.*

OFFICE OF THE NEW YORK LIFE-INSURANCE COMPANY,
No. 106 *Broadway, New York, Dec.* 8, 1851.

Policy 7779. Life of Augustine Davis Statham. $5,000.

Permission is hereby given to Augustine Davis Statham, the party insured under policy 7779, to travel and reside in any part of the United States east of the Rocky Mountains (except the cities of New Orleans and Mobile during prevalence of yellow fever) at all seasons of the year, and by first-class vessels to visit any northern port of the U. States on the coast of the Atlantic.

MORRIS FRANKLIN, *Prest.*

Filed with O. B. September 3rd, 1868.

L. A. LINDSEY, *Clerk.*

19

THE STATE OF MISSISSIPPI,
Chancery court of Hinds County, 1st dist., to wit:

To J. G. Milligan, Benj. G. Humphreys, Livingston Mims, and The New York Life-Insurance Company, greeting:

For certain causes offered before us in our court of chancery of said county, we command and strictly enjoin you that, laying all other matters aside, and notwithstanding any excuse, you personally appear at a court of chancery, to be holden at the court-room in the city-hall in the

city of Jackson, on the 1st Monday of November next ensuing, to answer a bill of complaint exhibited against you, defendants, by William Crawford Statham and Permelia A. Dudley, (formerly Statham,) complainants in our said court, and further to do and receive what our court shall have considered of in this behalf; and this you shall in no wise omit, under the penalty of one hundred dollars, as well as the consequences that may fall thereon. And have then and there this writ.

Witness the honorable John Watts, judge of the fourth judicial district said State, the first Monday of May, in the year of our Lord
20 one thousand eight hundred and sixty-8, and seal of said court.

Issued the 3 day of September, 1868, to the sheriff of Hinds County to execute and return.

[L. S.] L. A. LINDSEY, *Clerk.*

, *Deputy Clerk.*

Rec'd Sept. the 4th, 1868. Joseph McCloy, sh'ff, executed this writ on each of the defendants by reading the same to them, and at the same time delivering a true copy to each of them.

JOS. McCLOY, *Sh'ff.*
By T. F. OWEN, *D. S.*

Sh'ff's fees, $6.50.

The defendants, J. G. Milligan, Benjamin G. Humphreys, and Livingston Mims, will take notice that the suit named within has been commenced by the complainants to attach and stop the money, choses in action, other property and effects of the New York Life-Insurance Company in your hands, being non-resident defendants, in your hands as resident defendants, to satisfy a debt due by said New York Life-Insurance Company to complainants, and you are hereby notified not to deliver or to pay over to said New York Life-Insurance Company any such debt, or money, or effects, or property in your hands belonging to said New York Life-Insurance Company.

21 Witness my hand and the seal of said court this the 4th Sept., 1868.

[L. S.] L. A. LINDSEY, *Clerk.*

In the chancery court for the first district of Hinds County, Mississippi, to the November term, 1868.

W. C. STATHAM ET AL.
vs.
NEW YORK LIFE INSURANCE COMPANY ET AL.

And the said defendants, to wit, the New York Life-Insurance Company, Benjamin G. Humphreys, Livingston Mims, and J. G. Milligan, by their solicitors, by protestation, not confessing all or any of the matters and things in said complainant's original bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, demurs to said bill of complaint, and for cause of demurrer thereto show that said complainants have not in their said bill of complaint made such a case as entitles them, in a court of equity, to any discovery from these defendants, or either or any of them, or to any relief against them, or either or any of them, as to the matters contained in their said bill of complaint, or any of such matters, and that any discovery which can be made by said defendants, or either

22 or any of them, touching the matters contained in the said bill of complaint, or any of said matters, cannot be of any avail to said complainants for any of the purposes for which a discovery is sought against said defendants by said bill of complaint, nor entitle said complainants to any relief in a court of equity touching any of the matters complained of in said bill complaint; wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, these defendants demur thereto, and pray the judgment of this court whether they shall make any further and other answer to said bill of complaint; and also pray to be hence dismissed with their reasonable costs in this behalf sustained, and that said bill of complaint may be dismissed, &c.

And for special causes of demurrer to said bill of complaint said defendants assign the following, to wit:

1st. Because said bill of complaint shows that the demand of said complainants against said New York Life-Insurance Company is of a strictly legal character, and cognizable in a court of common-law jurisdiction.

23 2nd. Because complainants have full and adequate remedy by attachment and garnishment cognizable in a court of common-law jurisdiction.

3rd. Because the mere fact that some of said defendants compose a foreign corporation, and others of them are residents of the State of Mississippi, does not of itself confer jurisdiction upon a court of equity, especially when the character of the debt or demand sought to be enforced is strictly of a legal nature, and otherwise exclusively or properly cognizable in a court of common-law jurisdiction.

4th. Because a court of equity in the State has no jurisdiction of the remedy by attachment at the suit of resident creditors against non-resident debtors, "and others within the State having in their hands effects of or being indebted to such debtors," except in aid of a suit or suits then pending in such court of equity.

5th. Because a court of equity in the State has no jurisdiction of a suit commenced by attachment by a resident creditor against non-resident debtors "and others within the State having in their hands effects of or being indebted to such debtors," especially in which

24 the debt or demand sought to be enforced is not of such a character as would otherwise give jurisdiction to such court of equity.

6th. Because it does not affirmatively appear from the allegations of said bill of complaint of what disease the said Augustine Davis Statham died.

7th. Because it does not affirmatively appear by the allegations of said bill of complaint that the death of said Augustine Davis Statham was produced, or caused by, or was the result of any such contingency as, under the contract of insurance, made part of said bill of complaint, would render the New York Life-Insurance Company liable, either in law or equity, for the payment of any sum of money whatever.

8th. The bill of complaint shows that, by the contract between Mrs. Lucy B. Statham and the New York Life-Insurance Company, as set forth in the policy of insurance which is made part of said bill of complaint, it was expressly stipulated, among other things, as a condition upon which the life of the said Augustine Davis Statham was to be insured during the continuance of said policy of insurance, was the pay-

25 ment to said New York Life-Insurance Company of the sum of two hundred and eight dollars and fifty cents ($208.50) as a premium for such insurance, annually, during the continuance of said policy of insurance, on the 8th day of December, and that in the event each

of such annual payments of such premiums was not paid on or before such times for such payments, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and the policy shall cease and determine; and yet said bill of complaint alleges that the said money due for such annual premium on the 8th day of December, 1861, according to the absolute and unconditional contract on the part of the said Mrs. Lucy B. Statham, was not then paid to said New York Life-Insurance Company.

9th. Because said bill of complaint admits that the money due to said New York Life-Insurance Company on the 8th day of December, 1861, as the condition upon which they were to insure the life of said Augustine Davis Statham from that day up to the 8th day of December, 1862, was not paid on said 8th day of December, 1861; and yet said
26 bill of complaint does not allege or show any sufficient reason, either in law or equity, to excuse such non-payment of such premiums, so as to entitle the said Mrs. Lucy B. Statham, or her children, to recover of said New York Life-Insurance Company any sum of money as insurance on the life of said Augustine Davis Statham, after said 8th day of December, 1861, as provided for in the policy of insurance which is made a part of said bill of complaint.

10th. Because said bill of complaint does not allege or show that the non-payment of the money on the 8th day of December, 1861, as the premium then to be paid to the New York Life-Insurance Company as the condition upon which they were bound, by the policy of insurance which is made a part of said bill of complaint, to continue such insurance on the life of said Augustine Davis Statham after said 8th day of December, 1861, was the result of any act or default on the part of said New York Life-Insurance Company, or that such non-payment was a contingency or occurrence made excusable by the terms of said policy of insurance.

27 11th. Because said bill of complaint shows that the non-payment on the 8th day of December, 1861, of the premium then due to said New York Life-Insurance Company, as the condition upon which the life of said Augustine Davis Statham was to continue to be insured by them from that day to the 8th day of December, 1862, was the result of the voluntary action of said complainants and said Augustine Davis Statham in continuing to reside in the State of Mississippi at and during a time when that State was either in actual or so-called rebellion to the Government of the United States of America; and this was a contingency, or occurrence, or an event which was not provided against on the part of said Mrs. Lucy B. Statham in the policy of insurance which is made a part of said bill of complaint.

12th. Because it appears from the policy of insurance which is made a part of said bill of complaint that the payment of the annual premiums therein provided for were to be the voluntary acts of said Mrs. Lucy B. Statham, or her legal representatives, or children; and because in the event said Augustine Davis Statham was now alive, said
28 New York Life-Insurance Company could not, by any legal or equitable proceedings, compel said legal representatives of said Mrs. Lucy B. Statham or her children to pay them the aggregate of the sums named as annual premiums in said policy of insurance from the 8th day of December, 1861, to the 8th day of December, 1867.

13th. Because the offer to pay A. L. Brown as the agent of said New York Life Insurance on the 8th day of December, 1861, the premium then due on the policy of insurance which is made part of said bill of complaint, did not, either in law or in equity, amount to a valid tender of such premium, for the following reasons, as stated in said bill of com-

plaint: 1st. That said Brown was not then acting as such agent; 2nd. The legal representatives and children of said Mrs. Lucy B. Statham were then forbid by law from making any such payment; and 3rd. Because said New York Life-Insurance Company were then forbid by law from receiving any such payment.

14th. Because the laws of the United States Government referred to in said bill of complaint which prohibits the legal representatives of Mrs. Lucy B. Statham from paying and the New York Life-In-
29 surance Company from receiving the premium due on the 8th day of December, 1861, on the policy of insurance which is made of said bill of complaint, furnished no such excuse for the non-payment of the premium due on the 8th day of December, 1861, as will now authorize said legal representatives or children of said Mrs. Lucy B. Statham, either in court of law or equity, to recover from said New York Life-Insurance Company the insurance which would have been due from them on the life of said Augustine Davis Statham in case there had been no default in the payment of such premium on said 8th day of December, 1861, for the reason that in said policy of insurance such premium was payable absolutely and without any condition or stipulation that such non-payment should have any other effect than that said New York Life-Insurance Company "should not be liable to the payment of the sum insured or any part thereof, and that this policy should cease and determine."

15. And for divers other good causes of demurrer appearing in said bill of complaint.

T. J. AND F. A. R. WHARTON,
Sol's for Defts.

Filed Nov'r 5th, 1861.

L. A. LINDSEY, *Clk.*
C. P. SMITH, *D. C.*

30 Pleas and proceedings had and done before the honorable John Watts, judge of the fourth judicial district, sitting in chancery, at a court begun and held in and for the first district of the county of Hinds in the court-room in the city-hall on the first Monday, the second day of November, A. D. 1868. Present, the honorable John Watts, chancellor, L. A. Lindsey, clerk, Joseph McCloy, sheriff of Hinds County. And the court having been opened in due form by proclamation, proceeded to the dispatch of business, to wit:

November term, 20th day.—November 24th, 1868.

W. C. STATHAM ET AL.
vs. } 146.
NEW YORK LIFE-INSURANCE COMPANY ET AL.

By consent of counsel for the respective parties it is ordered and decreed that this cause be transferred to the chancery court for the second district of this county, and that the clerk of this court transmit the files of papers in this cause to that court by the first Monday of December, 1868.

List of papers in said cause.

1. Original bill. 2. Exhibit A, which is the policy of insurance. 3. Subpœna. 4. Demurrer of defendants to bill.

31 Chancery court, first district.

STATE OF MISSISSIPPI, *Hinds County:*

I, L. A. Lindsey, clerk of the said court, do hereby certify that the above and foregoing page contain a full, true, and correct copy of the

order made in the cause of W. C. Statham et al. vs. New York Life-Insurance Company et al., No. 146 on the docket of said court, and also a correct list of the papers in said cause.

In testimony whereof I hereunto set my hand and affix the seal of said court at office at Jackson, this the 11th day of December, A. D. 1868.

[L. S.] L. A. LINDSEY, *Clerk.*

Filed Dec'r 14th, 1868.

L. A. LINDSEY, *Clk.*

STATHAM ET AL.
vs.
N. Y. LIFE-INSURANCE CO.

Ordered, that the certificate of the clerk of this court for 1st district of the transfer of this cause be filed, and that this cause be placed upon the dockets of this court for further proceedings.

32 In the chancery court for the second district of Hinds County, Mississippi, at December term, 1868.

W. C. STATHAM ET AL.
vs.
NEW YORK LIFE-INSURANCE COMPANY. } 235.

This cause coming on to be heard by the court this day on the bill of complaint and exhibit thereto and the demurrer of the several defendants thereto, and the same having now been duly considered by the court, it is thereupon ordered, adjudged, and decreed that said demurrer be, and the same is hereby, sustained, and said bill of complaint dismissed at the costs of the complainants therein, to be taxed by the clerk of this court, for which execution may issue as at law. Ordered, adjudged, and decreed on this the 16th day of December, 1868.

JNO. WATTS, [SEAL.]
Judge of the Fourth Judicial District of the State of Mississippi.

Filed and entered 16th day of December, 1868.

L. A. LINDSEY, *Clerk.*

To the clerk of the chancery court of the county of Hinds and State of Mississippi:

Your petitioners, W. C. Statham and Permelia A. Dudley, re-
33 spectfully represent that on the 3rd day of September, in the year 1868, they filed their bill of complaint in the chancery court for the 1st district of Hinds County against The New York Life-Insurance Company; and petitioners further represent that said case was transferred to the 2nd district of Hinds County, and, at the December term, 1868, of said court, there was a decree rendered in said case dismissing your petitioners' bill. Your petitioners, feeling themselves aggrieved by said decree, and believing that the court erred in making said decree, pray for an appeal to the next term of the high court of errors and appeals, that said decree may be reviewed and corrected, and they herewith tender a bond with security, as required by law.

W. C. STATHAM AND
PERMELIA A. DUDLEY,
By W. AND J. R. YERGER,
Their Attorneys.

Filed April 14th, 1869.

J. M. STONE, *Clerk.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Know all men by these presents that we, W. C. Statham and Per-
34 melia A. Dudley, as principal, and J. R. Yerger and George A. Smythe, as sureties, are held and firmly bound unto the New York Life-Insurance Company in the penal sum of $200.00, for the payment of which, well and truly to be made, we bind ourselves and our heirs, &c., jointly and severally and firmly by these presents. Witness our hands and seals this 14th day of April, A. D. 1869. The condition of this bond is this, that whereas a decree was rendered in the chancery court of Hinds County for the 2nd district thereof, at the December term of said court, 1868, dismissing a bill filed in the chancery court of the 1st district of Hinds County, being No. 235, and which had been transferred to said 2nd district, and the said complainants have prayed an appeal, &c., in said cause: Now, if the complainants, the parties of the first part, shall prosecute said appeal with effect, or, in case of failure therein, shall pay and satisfy all the costs of said appeal in case said decree be affirmed, then this obligation to be void; otherwise in full force and effect.

W. C. STATHAM, [SEAL.]
By W. AND J. R. YERGER.
35 PERMELIA A. DUDLEY, [SEAL.]
By W. AND J. R. YERGER.
GEO. A. SMYTHE. [SEAL.]
J. R. YERGER. [SEAL.]

Approved and filed April 14th, 1869.

J. M. STONE, *Clk.*

THE STATE OF MISSISSIPPI:

To the honorable the chancery court of Hinds County, 2nd district, greeting:

Whereas on the 22nd day of January, 1872, the same being a day of a regular term of our supreme court, begun and held in the court-room in the capitol, in the city of Jackson, in said State, on the 3rd Monday of October, in the year of our Lord 1871, the following final decree was rendered by our said supreme court, to wit:

W. C. STATHAM AND PAMELIA STATHAM, NOW Pamelia Dudley,
vs.
NEW YORK LIFE-INSURANCE COMPANY. } 12052.

This cause having been submitted at a former term, upon the record herein, from the chancery court of Hinds County, 2nd district, and this court having sufficiently examined and considered the same, and
36 being of opinion that there is error therein, doth order, adjudge, and decree that the decree of said court rendered in this cause at the December term thereof, A. D. 1868, be, and the same is hereby, reversed; and this court, proceeding to render here such decree as said chancery court ought to have rendered, doth order, adjudge, and decree that the demurrer of defendant to complainant's bill of complaint be, and the same is hereby, overruled, and this cause now remanded to said chancery court, with leave to defendant to answer within sixty days from this date. And it is further considered, and so ordered, adjudged, and decreed by this court, that the appellants do have and recover of the appellees the costs of this cause in this court expended, &c., to be taxed, &c.

You are therefore hereby commanded that such execution and further proceedings be had in said cause as, according to right and justice, the judgment of our said supreme court and the law of the land ought to be had.

Witness the Hon. E. G. Peyton, chief-justice of our supreme court; also the signature of the clerk and seal of said court, hereunto affixed at office at Jackson, this 3rd day of February, 1872.

[L. S.] JAS. M. McKEE, *Clerk.*

Filed 7th Feb'y, 1872.

MURRAY PEYTON, *Clk.*

37 STATE OF MISSISSIPPI, *Grenada County:*

I, C. P. Lincoln, clerk of the chancery court of said county and State, pursuant to the notice herewith attached and returned in the case of W. C. Statham et al. vs. New York Life-Insurance Company et al., caused A. S. BROWN, a witness for the complainants, to come before me on the day and at the place specified in said notice, and having first duly sworn him the truth and whole truth to depose, he, on his oath, testified as follows:

Int. 1st. Were you or not the agent of the New York Life-Insurance Company in the State of Mississippi, on the 8th day of December, in the year 1851, or at any other period of time? If so, when were you appointed such agent, and for what length of time were you appointed, and how long did you continue to act as such agent?

Answer. I was the agent on the 8th day of December, 1851, before that time and since, the agency to this day never having been revoked to my knowledge. Still, I have not acted as such agent since the close of the war. I herewith file Morris Franklin', president of said

38 New York Life-Insurance Company, letter of Dec. 20th, 1849, which came with my appointment as agent for said company. My appointment was for no specified length of time, or at least that is my recollection. I considered that I was agent even during the war, and should have received premiums during the war had I been placed in possession of the renewal receipts. When the lines were closed, so that communication was cut off, so that I could not receive renewal receipts, I then refused all monies offered me on policies for which I was acting as agent.

Int. 2. How were you appointed such agent, verbally or in writing, and what were your powers and duties as such agent? If your appointment was in writing, what has become of it; and if in your possession or control, file the same, or a copy of it, with your answer to this question. If not in your possession or control, state whether it has been lost or mislaid; and, if so, whether you have made diligent search for it, and been unable to find it. In that event, state the contents of the writing and the extent of the powers which it conferred upon you.

39 Ans. 2. My appointment was in writing. 2. To solicit and receive applications for policies of insurance and receive premiums on same, which appointment has been mislaid. I have made diligent search for the same, and have been unable to find it; have already stated substantially the contents of said appointment as regards the extent of the powers which it conferred.

Int. 3. Were you or not the agent of said company with whom Mrs. Lucy B. Statham effected an insurance in said company on the 8th day of December, in the year 1851, on the life of her husband, Dr. Augustine D. Statham, for her sole use during her life, and for the benefit of her

children after her death? And if so, state whether or not the annual premiums on said policy were regularly paid until and including the premium due on the 8th day of December, in the year 1860; if so, state to whom such premiums were paid, and whether they were not paid to you as the agent of said company. State also whether or not the said company did not regularly furnish you receipts for premiums so paid, signed by the president, vice-president, or actuary of said com-
40 pany, every year from the 8th day of Dec., 1851, up to the 8th day of December, 1860, to be delivered by you on payment of the premiums on said policy to the parties so paid. If so, state whether or not said company ever notified you or the holders of said policy that they would not send to you a receipt for the premiums due on the 8th of December, 1861; and also state whether the premium due on said policy was paid on the 8th day of December, 1861, or not.

Ans. 3. I was. They were. They were paid to me as agent of said company. They did furnish receipts annually as described. They did not notify me or any policy-holders in said company that they would not furnish receipts for premiums due on the 8th day of December, 1861, that I am aware of. It was tendered to me, but I refused to receive it.

Int. 4. If the premium due on said policy on the 8th day of December, 1861, was not paid to you, state why it was not so paid, and whether or not the representatives of Mrs. Statham, before the 8th day of December, 1861, offered to pay you as the agent of said company the
41 premium due on that day upon said policy. If they did so offer, state whether you received payment of the same or not. If you did not so receive it, state why you did not, and what you assigned for refusing.

Answer 4. The representative of Mrs. Lucy B. Statham, to wit, Augustine D. Statham, her husband, offered to pay me, as agent of said company, the premium due on that day upon said policy, which I did not receive because I was not placed in possession of renewal-receipts from the home-office, which was offered to me before 8th day of December, 1861.

Int. 5th. Was or not your agency of said company limited to any fixed period of time? Was or not your authority as agent of said company ever specially revoked by said company? If so, when was it revoked? Had there been any special revocation of your power as agent ever *been* made by said company between the 8th day of December, 1860, and the 8th day of December, 1861? If so, state when and how such revocation was made.

Ans. 5. No; nor has there ever been any general or special revo-
42 cation of my authority as such agent to the best of my recollection.

Int. 6. When did Dr. Augustine D. Statham die? Was it or not some time in July, 1862? And where did you reside in 1851, and where do you now reside? Were you or not a resident of the State of Mississippi from the commencement of the civil war in 1861 until its close; and were or were not Dr. Statham and the children and the representatives of Mrs. Lucy B. Statham residents of the State of Mississippi from the commencement of the civil war in 1861 until the death of Dr. Statham; and did not the children and the representatives continue to be residents of the State of Mississippi until the close of the civil war?

Ans. 6. Do not know the date of the death of Dr. Augustine D. Statham, but think some time in the year 1862. Resided near Grenada, Mississippi, in 1851, and reside there now. In the year 1861 I lived a portion of the time in Grenada and a portion of the time in Memphis,

after which I resided near Grenada until the close of the war. Dr. Statham, up to the time of his death, and the representatives of Mrs. Lucy B. Statham, resided near Grenada, Miss., at the commencement, during, and until the close of the civil war.

43 Int. 7th. State, if you know, whether Augustine D. Statham was actively enlisted in any military service, State or Confederate, against the United States, and also state the same thing of yourself.

Ans. 7th. Neither one of us were engaged in any military service agains' the United States.

Cross-int. by defendant:

X-int. 1. State when your agency of said company commenced and when terminated; when, and in what way or manner, and end was put to such agency, and especially say whether or not in fact you were such agent on the 8th day of December, 1861, or whether or not you were acting as such agent at the time last herein referred to.

Answer. My agency commenced in 1849. It has never been revoked or terminated to my knowledge. After the lines were closed, and renewal-receipts failing to come to hand, I refused to receive premiums on policies. Then, and since, I consider I was agent in fact on the 8th day of December, 1861. I was acting as agent for said company on the 8th day of Dec., 1861. I could not tell what am'nt to receive until

44 renewal-receipts came to hand, which receipts never came to hand.

X-int. 2. State fully what agency you had in effecting an insurance on the life of Augustine D. Statham in the New York Life-Insurance Company, and whether or not you acted in such respect as the agent of said company. If you acted as agent for said insurance company, then state when and to whom was the last payment of the premium-money due on such insurance paid; especially state whether or not there was any payment of such premium-money on 8th day of December, 1861.

Answer 2. By receiving application for such insurance; sending the same, as the agent of the company, to the New York Life-Insurance Company, on which policy was issued and sent to me, as agent, to be delivered to the party, which was duly done. The last payment of premium was paid to me as agent on the 8th day of December, 1860, and was for'd to the office in New York. There was no payment of premium-money received by me on the 8th day of December, 1861.

X-int. 3. If any money was tendered to you on the 8th day of De-

45 cember, 1861, in payment of the premium due on the policy of the said Augustine D. Statham, state by whom, where, and at what hour of that day such premium-money was so offered or tendered; also state fully and particularly what was the am't then so offered or tendered; what kind or character of money or representative. If money was then so offered or tendered, was the exact am't of such premium-money then due actually counted before and then tendered to you, or did the person who so tendered it merely offer it to you as such amount of money, and without such counting in your presence; also, and in particular, state whether the money then so tendered to you was in gold or silver coin, United States Treasury notes, United States national-currency notes, or in notes of the then Confederate States treasury.

X-answer. The money was tendered to me by Augustine D. Statham in person, before the 8th day of December, 1861, to pay premium due the 8th day of Dec., 1861, as he always had done for ten payments

46 before. He offered to pay the same at Grenada. The day and the hour such payment was tendered I cannot say. The payment of

said premium was not tendered on the 8th day Dec., 1861, but some days before. No particular amount of money was tendered in payment of said premium, as the precise amount was *not* known to neither myself or Statham. I do not know the kind or character of money he offered to pay his premium in, nor the exact amount he offered in payment of said premium. He did not count the money in my presence, but my impression is he had the money in his hand, but what kind I do not know. He did not offer to pay me the premium in gold or silver, and I cannot state whether the money he had to pay said premium was U. S. national-currency notes, or U. S. Treasury notes, or notes of the Confederate States.

X-int. 4. State why you refused to receive the premium-money. State whether you did not refuse to receive said money because you were not acting as agent for said insurance company, or because said insurance company had not transmitted to you the proper receipt to be given for the payment of the premium-money so due on the 8th day of De-
47 cember, 1861. If such receipt to be given on such payment of said premium had not been sent to you from New York City by said insurance company, then state the reason why it had not been so sent, and state whether or not there could be any communications then transmitted to you from New York City by said insurance company, and if not, then state fully the reason why.

X-ans. 4. I refused to receive the premium-money for the want of renewal-receipts. I did not refuse because I was not acting as such agent, but because the company had not transmitted to me the proper receipt to be given for the payment of the premium-money so due on the 8th day of Dec., 1861. My impression is that the lines being closed was the reason for not sending forward the proper receipts. I do not believe that any communications from the city of New York could have reached me at that time, in consequence of the existence of the war.

X-int. 5. Did or did not the rules and regulations of the New York Life-Insurance Company authorize agents to receive money for pre-
48 miums due *thereon* policies of insurance of lives except when such agent had been furnished by said insurance company with the proper receipts to be delivered by them on the payment of such premium-money? Had or not the agents of said insurance company authority to make out and sign such receipts, or were such receipts always made out and signed by said insurance company in said city of New York and transmitted to their agents, as a means of enabling parties desiring to pay such premiums to do so to agents of said insurance company convenient to them, and to save them the trouble, risk, and expense of making such payments in the city of New York?

Answer. Agents of said company were authorized to receive premiums due on policies without being furnished with proper renewal-receipts, but I never did so, except on one or two occasions when receipts did not arrive in time; but in this particular case I felt that I was not willing to receive the premium-money without the proper receipts. Agents had no authority to make out and sign receipts for pre-
49 mium-money. Such receipts were made out and signed by the company in New York City, and transmitted to the agents and countersigned by him. Said receipts were not so made out for premium-money and sent to agent as a matter of convenience to save the policy-holder the trouble, risk, and expense of making such payment in the city of New York; but it was a duty and a second consideration that the office agreed to establish an agency and keep the same for the convenience of those who insured in said company.

X-int. 6. With whom did the New York Life-Insurance Company agree to establish an agency for the convenience of parties insuring in said company?

Answer. With me, through their gen'l travelling agent, Jno. R. Church.

X-int'y 7th. Have you had any communication with said company as its agent since the summer of 1861?

Answer. I have not.

X-int. 8. Did you continue to solicit and receive applications for policies of insurance, and receive premium-money due on policies after the commencement of the war?

Answer. I did not.

X-int. 9. State whether you had authority from the New York
50 Life-Insurance Company to receive premiums on policies before said premiums became due, and were not the renewal-receipts uniformly dated on the day that said premiums were due?

Answer. I considered that I did, and nine times out of ten I received the money a few days before it was due. At least that was my practice. Said receipts were dated the day and date said premium was due.

X-int. 10. If neither Augustine D. Statham or yourself were not actively enlisted in any military service, State or Confederate, against the United States during the late war, state reason why.

Answer. Because we were too old.

Re-examination:

Int. 1st. Was it made known by you, as agent, to Dr. Augustine D. Statham whether or not the payment on said policy were to be made in Grenada or New York City? If so, state your information to him on that subject.

Answer. My information to him upon that subject was that the payments on said policy were to be made to me in the town of Grenada.
51 (The last question and answer objected to by defendants' counsel upon the ground that it is incompetent.)

A. S. BROWN.

And the above examination having carefully read to and understood by the deponent and subscribed by him, it is herewith certified under my hand and seal of office this the 29th day of April, 1872. And I hereby certify that said deposition was taken by me at the court-house in the town of Grenada, pursuant to the notice herewith annexed.

Given under my hand and seal of office at the court-house, in the town of Grenada, this 29th day of April, 1872.

[L. S.] C. P. LINCOLN,
Clk. and Commissioner.

Deposition-fees, $6.50; swearing witness, 25; certificate, 50; postage, 30; total, $7.55.

To New York Life-Insurance Company et al., or your solicitors, T. J. and F. A. R. Wharton:

You will take notice that on Monday next, 29th of April, 1872, we will take the deposition of A. S. Brown, at the court-house of Grenada
52 County, in the town of Grenada, which deposition will be read in evidence in behalf of complainants in the suit in chancery No. 235, in Hinds County, in district, in which W. C. Statham e

complainants and you are defendants. You can attend and cross-examine if you see fit.

Jackson, April 22nd, 1872.

Respectfully,

W. AND J. R. YERGER,
Sol's for Complainants.

Service of this notice acknowledged.

T. J. AND F. A. R. WHARTON,
Sol's for Defts.

W. C. STATHAM
vs.
NEW YORK LIFE-INSURANCE CO. ET AL. } 235.

On motion of solicitors for the defendants, it is ordered by the court that the answer of the defendant Livingston Mims to the bill of complaint in this cause be filed.

To the Hon. E. W. Cabaniss, chancellor of the 16th chancery district of the State of Mississippi, presiding in the chancery court for the 2nd district of Hinds County in said chancery-court district.

53 The answer of Livingston Mims to the bill of complaint of W. C Statham et als. vs. The New York Life-Insurance Company et al., No. 235, now pending in said chancery court.

Respondent, for answer to said bill or to such parts thereof as he is advised it is necessary for him to make answer, thereto answering says: He admits that said Humphreys, himself, and Milligan were, on the 3rd day of September, 1868, the resident agents of and for said New York Life-Insurance Company in the State of Mississippi, having their principal office at the city of Jackson in said State of Mississippi, and that, as such agents, they had in their possession, in the State of Mississippi, money, choses in action, and other property and effects belonging to said New York Life-Insurance Company.

Further answering, said respondent says: That, inasmuch as their said agency commenced after the death of said Augustine Davis Statham, as alleged in said bill of complaint, he has no knowledge as to the many allegations of said bill of complaint, and especially no knowledge as to the said insurance of the life of said Augustine Davis Statham, or as regards any tender of the premium due on the 8th day of De-
54 cember, 1861, the said policy for the insurance of his life, or as to the time or cause of his death, or as to the death of said Mrs. Lucy B. Statham; or as to who are the heirs of said Lucy B. Statham, nor as to the time when said A. S. Brown was appointed agent for said New York Life-Insurance Company, or when his said agency ceased, or was revoked. And having fully answered, &c., said respondent prays to be hence dismissed with reasonable costs, &c.

L. MIMS.

T. J. AND F. A. R. WHARTON,
Sol's for Respondent.

THE STATE OF GEORGIA,
City of Savannah:

Personally appeared before me, John W. Burroughs, a commissioner of deeds for the State of Mississippi, duly appointed and commissioned by the executive authority thereof, Livingston Mims, who, after being by me duly sworn, upon his oath says that the matters stated in the foregoing answer are true according to the best of his knowledge.

Given under my hand and seal of office in the city of Savannah on this the twenty-second day of April, 1872.

[L. S.] JOHN W. BURROUGHS,
Commissioner of Deeds for the State of Mississippi.

Filed May 25th, 1872.

MURRAY PEYTON, *Clerk.*

55 Chancery court, second district, Hinds County, State of Mississippi.

WILLIAM C. STATHAM AND PEMELIA A. DUDley, complainants,
vs.
THE NEW YORK LIFE-INSURANCE COMPANY, Benjamin G. Humphreys, Livingston Mims, and J. G. Milligan, defendants. } No. 235.

To the court of chancery for the sixteenth district of the State of Mississippi, sitting for the second district of Hinds County.

The petition of The New York Life-Insurance Company respectfully shows, that an action was commenced in this court against your petitioner, a body politic and corporate, and against the other defendants above named, on or about the 3rd day of September, in the year 1868. That the said complainants are, and were at the time of the commencement of said action, citizens of the State of Mississippi. That the said defendant, your petitioner, then was and still is a body politic and corporate, created by and organized under the laws of another State of the United States, to wit, the State of New York. That the other
56 of said defendants in said action are all citizens of the State of Mississippi aforesaid. That the matter in dispute in this action exceeds the sum of five hundred dollars, exclusive of costs. That the said complainants claim that they are entitled to recover against your petitioner the specified sum of five thousand dollars and interest, being the amount secured by a certain policy of insurance made by your petitioner on the life of one A. D. Statham in favor of and to be paid to his wife, Lucy B., in case she survived her husband; if she did not, then to her children, who are the complainants herein. That the other defendants are made parties upon the averment that they have in their hands effects and moneys belonging to your petitioner, the remittance of which your petitioner they seek to prevent by injunction. That in this court a demurrer was interposed to the complaint, which was sustained by this court, but the judgment thereupon was reversed on appeal, and the cause remanded to this court, and has not been tried, nor has the same had a final hearing. That this action is one in which there can be a final determination of the controversy, so far as it concerns your petitioner, without the
57 presence of the other defendants as parties in the cause. That your petitioner has procured and caused to be filed in this court the affidavit of its president, Morris Franklin, as prescribed by the act of Congress passed March 2nd, 1867, entitled "An act to amend an act entitled 'An act for the removal of causes in certain cases from State courts,'" approved July 27th, 1866, setting forth that your petitioner has reason to believe, and does believe, that, from prejudice or local influence, it will not be able to obtain justice in said State court. That your petitioner hereby offers good and sufficient surety for their entering in

the next circuit court of the United States for the southern district of Mississippi, on the first day of its session, copies of the process against it in this suit, and of all pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning it, and also for its then appearing and entering special bail in the said cause, if special bail was originally requisite therein, according to the law and practice of the United States and its courts.

Your petitioner therefore prays that, pursuant to the said several
58 acts of Congress passed respectively on the 27th day of July, 1866, and March 2nd, 1867, relative to the removal of causes from State courts in certain cases, the said cause may be removed for trial into the next circuit court to be held in the district where the suit is pending, to wit, into the next circuit court of the United States for the southern district of Mississippi, pursuant to the provisions of the said statutes in such cases made and provided, and that this court do accept the surety as offered by your petitioner, and do proceed no further in the said cause, and for such other or further order or relief in the premises as may be just.

MORRIS FRANKLIN,
President.

Dated May 6, 1872.

STATE OF NEW YORK,
City and County of New York, ss:

Morris Franklin, of said city, being duly sworn, deposes and says that he is the president of the above-named defendant and petitioner, The New York Life-Insurance Company; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be
59 on information and belief, and, as to those matters, that he believes it to be true.

MORRIS FRANKLIN, *Pres.*

Sworn before me this 6th day of May, 1872.
[L. S.] JNO. R. ANDERSON,
Commissioner for Mississippi, in City, County, and State of New York.

Know all men by these presents that we, The New York Life-Insurance Company, by Morris Franklin, its president, the said Morris Franklin, of Long Island, in the State of New York, individually, and Thomas E. Helm and Thomas J. Wharton, of the county of Hinds and State of Mississippi, are held and firmly bound unto William C. Statham and Permelia A. Dudley, of Grenada County, State of Mississippi, in the penal sum of one thousand dollars, for the payment of which sum we bind ourselves and our respective heirs, executors, administrators, and successors, jointly and severally, firmly by these presents. Dated this 6th day of May, in the year 1872.

Whereas the above-named William C. Statham and Permelia A. Dudley, citizens of the State of Mississippi, have commenced an action
60 in the chancery court of the State of Mississippi for the second district of Hinds County against The New York Life-Insurance Company, a body politic and corporate, created by and organized under the laws of the State of New York, and against Benjamin G. Humphreys, Livingston Mims, and J. G. Milligan, citizens of the State of Mississippi, which action has been instituted and is prosecuted for the recovery of a specific sum of five thousand dollars or thereabouts, with

interest, from the said New York Life-Insurance Company, and to enjoin the other defendants from remitting to said company effects and moneys alleged to be in their hands belonging to said company;

And whereas the said New York Life-Insurance Company, by Morris Franklin, its president, did make, and on the day of , in the year 1872, did cause to be filed in the said court of chancery the affidavit prescribed by the act of Congress passed March 2nd, 1867, entitled "An act for the removal of causes in certain cases from State courts," approved July 27th, 1866, and on the day of May, 1872, caused to be filed its petition in said chancery court for the removal of said cause into the next circuit court of the United States for the southern
61 district of Mississippi, pursuant to the provisions of the said several statutes, to wit, the act of July 27th, 1866, and of March 2nd, 1867:

Now, therefore, the condition of this bond, obligation, or undertaking is such, that if the said defendant, The New York Life-Insurance Company, shall enter into the next circuit court of the United States, to be held in the said southern district of Mississippi, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and shall do such other appropriate acts as by the said act of July 27th, 1867, are required to be done upon the removal of a suit into the United States court, and shall then appear and enter special bail in said cause, if special bail was originally requisite therein, then this bond, obligation, or undertaking shall be void and of no effect; otherwise it shall remain in full force and virtue.

In the presence of—

MORRIS FRANKLIN, *President.* [SEAL.]
MORRIS FRANKLIN. [SEAL.]
THOMAS E. HELM. [SEAL.]
T. J. WHARTON. [SEAL.]

62 STATE OF NEW YORK,
City and County of New York, ss:

On the fourth day of May, in the year 1872, before me personally appeared Morris Franklin, to me known to be the president of the New York Life-Insurance Company, and to be the same individual who signed the foregoing instrument as such president, and also in his individual capacity, and acknowledged to me that he executed the same in both said capacities, to wit, for and as the act of the said company as its president and also in his individual capacity, for the uses and purposes therein mentioned.

[L. S.] JNO. R. ANDERSON,
Commissioner for Mississippi in City, County, and State of New York.

Court of chancery, first district, Hinds County, State of Mississippi.

WILLIAM C. STATHAM AND PERMELIA A. Dudley, complainants,
vs.
THE NEW YORK LIFE-INSURANCE COMPANY, and others, defendants. } No. 235.

CITY AND COUNTY OF NEW YORK, *ss:*

Morris Franklin, of said city, being duly sworn, deposes and
63 says that he is the president of the New York Life-Insurance Company, one of the defendants in this action, and that the above-

entitled action is now pending in the chancery court of the State of Mississippi, for the first district, Hinds County, and that he has reason to believe, and does believe, that from prejudice or local influence the said defendant will not be able to obtain justice in said court.

Sworn before me this 4th day of May, 1872.

MORRIS FRANKLIN.

[L. S.] JNO. R. ANDERSON.

Commissioner for Mississippi in City, County, and State of New York.

Filed May 25, '72.

MURRAY PEYTON, *Clk.*

In the chancery court for the second district of Hinds County, Mississippi, at the May term, 1872.

W. C. STATHAM AND PERMELIA A. DUDLEY
vs.
THE NEW YORK LIFE-INSURANCE COMPANY, B. G. Humphreys, Livingston Mims, and J. G. Milligan. } No. 235.

This cause coming on to be heard by said chancery court upon the application of said New York Life Insurance Company, one of
64 the defendants in the above-stated cause, for a transfer or removal of said cause into the next term of the circuit court of the United States for the southern district of the State of Mississippi, for future and final proceedings and determination therein as to said complainants and said New York Life-Insurance Company, and upon notice of said application to Messrs. W. and J. R. Yerger, as solicitors for said complainants, and said chancery court having now duly examined said application for such transfer or removal of said cause, and having heard and duly considered the arguments of solicitors for the respective parties *to* and against said application, and being now satisfied that said defendant, the New York Life-Insurance Company, has in all things complied with the acts of the Congress of the United States of America for the purpose of having said cause so removed or transferred into said circuit court of the United States for the southern district of the State of Mississippi, for further and final adjudication and determination as between said complainants and said New York Life-Insurance Company, doth now order, adjudge, and decree as follows, to wit:

65 That this case be transferred or removed unto said circuit court of the United States for further and final proceedings, determination, and judgment, or decree therein, as between said W. C. Statham and Permelia A. Dudley, complainants, and the said New York Life-Insurance Company, as one of the defendants in this cause; provided said New York Life-Insurance Company shall, on the first day of the next session of said circuit court of the United States for the southern district of the State of Mississippi, to wit, on the first Monday of November, 1872, enter therein copies of the process, pleadings, depositions, testimony, and other proceedings in said cause in this court and in the supreme court of the State of Mississippi.

It is further ordered, adjudged, and decreed, that upon said defendant, said New York Life-Insurance Company, entering in said circuit court of the United States for the southern district of Mississippi, on the first day of its next session, to wit, on the 1st Monday of November, 1872, copies of such process, pleadings, depositions, testimony, and other pro-

ceedings so heretofore had and done in this cause, all further proceedings as between said complainants and said New York Life-
66 Insurance Company in this cause by this court do cease and determine, and that the same be further and finally proceeded in and determined by said circuit court of the United States for the southern district of the State of Mississippi, as between said complainants and said New York Life-Insurance Company. But that said cause be retained by said chancery court for the second district of said Hinds County for further adjudication, as between said complainants and said other defendants, to wit, B. G. Humphreys, Livingston Mims, and J. G. Milligan.

It is further ordered, adjudged, and decreed that, in the event said New York Life-Insurance Company shall so enter in said circuit court of the United States for the southern district of Mississippi, on the first day of its next session, as aforesaid, copies of said process, pleadings, depositions, testimony, and other proceedings in said cause, then, and in such case, the bond executed by said New York Life-Insurance Company for such purpose, in the penalty of one thousand dollars, with Morris Franklin, Thomas E. Helm, and T. J. Wharton, as securities, dated May 6th, 1872, and filed with said application, for
67 the removal of said cause into said circuit court of the United States for the southern district of the State of Mississippi, do cease and become null and void. Finally ordered, adjudged, and decreed on this the 25th day of May, 1872.

E. W. CABANISS,
Chancellor of the 16th Chancery District of the State of Mississippi.

Filed and entered May 25th, 1872.

MURRAY PEYTON, *Clerk.*

In the chancery court.

WILLIAM C. STATHAM ET AL.
vs.
THE NEW YORK LIFE-INSURANCE COMPANY. } 235.

The answer of the respondent, The New York Life Insurance Company, to the bill of complaint of the plaintiff herein, respectfully shows to the court as follows:

The said respondent admits that it is a corporation duly incorporated by and under the laws of the State of New York, and that its principal and only home-office or place of business is in the city and State of New York. It admits that the plaintiffs are, and that Augus-
68 tine Davis Statham and Lucy B. Statham were, during the period in the said bill of complaint mentioned, and during their respective lives, after the issuing of the policy of insurance in the said bill of complaint referred to, *were* citizens, residents of the State of Mississippi.

It admits that at or about the time in that behalf alleged in the said bill of complaint it issued its policy of life-insurance, number 7779, on the life of the said Augustine Davis Statham, for the benefit of his wife, for the sum of five thousand dollars. For greater certainty in relation to the provisions, terms, and conditions of the said policy this respondent refers to the said policy, now in possession of the complainants, as part of its answer, and prays that said policy may be produced on the trial of this suit by the said complainants.

Further answering the said bill of complaint, this respondent alleges

that, by the terms of the said policy, it was, among other things, expressly provided that if the annual premium therein called for was not paid on the eighth day of each December during the life of the said Augustine Davis Statham the said policy should thereupon be and become
69 void and of no force and effect; and this respondent alleges that the amount of premium which by the terms and conditions of said policy was a condition-precedent to the continued existence of said policy, payable on the eighth day of December, in the year one thousand eight hundred and sixty-one, was not paid or tendered to this respondent directly, or to any person authorized by this respondent to accept or receive the same, and that by reason thereof the said policy, according to its own provisions, became and is of no force and effect.

This respondent admits that the payments of the annual premiums on said policy were paid to one A. S. Brown, up to and including the premium due and payable thereon on the eighth day of December, in the year one thousand eight hundred and sixty, and that said Brown, during the period when the said premiums were so paid to him, was an agent of this respondent, and resided at Grenada, in the State of Mississippi, but this respondent alleges in relation to the said agency of the said Brown that on the eighth day of December, 1861, the said
70 Brown was not, and for some months before had not been, the agent of this respondent for any purpose.

This respondent alleges and insists that it was not required by the said policy of insurance, or by any agreement with the said Augustine Davis Statham, or by any law of the State of Mississippi, or of New York, to keep and maintain an agent at Grenada or elsewhere in the State of Mississippi, authorized to receive payments of the premiums which might at any time be payable on said policy of insurance, and that it permitted the payment of said premiums to the said Brown, instead of at its office in the city of New York, up to and including the payment made on the eighth day of December, in the year one thousand eight hundred and sixty, as a matter of favor and convenience to the said Augustine Davis Statham, and not as a matter of right.

Further answering the said bill of complaint, this respondent alleges that it is a mutual life-insurance company, and that being such mutual company, the said Augustine Davis Statham, so long as he complied with the terms and conditions of said policy, and until the breaking out of the war set forth in the said bill of com-
71 plaint, was a member of said corporation, and bound by all the laws, bye-laws, rules and regulations, and customs thereof; that among such rules and regulations and customs of which the said Augustine Davis Statham was aware, or by which he, being such member, was bound as aforesaid, was one to the effect that no agent of the said company had any authority or right to collect or receive the premiums due or to become due on the policies issued by said company unless the said agent had received from the said company for delivery to the policy-holder paying such premiums a receipt for the same signed by president, vice-president, or actuary of said company. That the said Brown did not have any receipt for the premium which by the terms of said policy would have become payable on the said eighth day of December, 1861, had the said policy continued in force, signed by either the president, vice-president, or actuary of said company, and it alleges that the said Brown, without such receipt, had no power to accept or receive the payment of such premium, or a tender thereof for or on
72 behalf of this respondent. This respondent has no knowledge or information sufficient to form a belief as to whether the said Au-

gustine Davis Statham, or any person on his behalf, offered or tendered the payment of such premium to the said Brown as alleged in the said bill of complaint.

Further answering the said bill of complaint, this respondent admits the statements and allegations therein contained that the State of Mississippi, in convention, passed a pretended ordinance of secession, and that from and after the month of April, in the year 1861, to the month of May, in the year 1865, a war existed between the said State and certain other States leagued together under the name and style of the Confederate States of America on the one side, and the United States of America on the other side; that during the period last aforesaid this respondent was a citizen of the State of New York, with its principal and only place of business in the city of New York; and that the said Augustine Davis Statham, during his life, was a citizen of the State of Mississippi and a resident of said State, and that during said war all commercial
73 intercourse and dealings between citizens and residents of the said State of Mississippi and the State of New York, respectively, was forbidden by the laws of the United States, and that it was unlawful for the said Augustine Davis Statham, while he continued to be a citizen and resident of the said State of Mississippi, to transmit during said war money to this respondent. But this respondent alleges and insists that the said Augustine Davis Statham might, without violating the laws of the United States, have changed his residence to the State of New York, or to some other of the United States of America not then included in the league aforesaid, and thereupon, had he so desired, have paid the said premium to this respondent in the city of New York when it became payable as aforesaid; and this respondent alleges that, by reason of the non-payment of said premium, the said policy, by its terms, became null and void.

Further answering said complainant, this respondent alleges that on and after the commencement of said war and until his death the said Augustine Davis Statham, in violation of his duty and allegiance to the United States of America, adhered and gave his allegiance to the said State of Mississippi in making war upon the United States, and
74 thus became, and was, on and before the eighth day of December, 1861, a public enemy of the said United States and of this respondent. That by reason of the war aforesaid and the citizenship and residence of the said Augustine Davis Statham and of this respondent, as aforesaid, it became and was unlawful for this respondent to insure or continue its insurance of the life of the said Augustine Davis Statham, he being then such public enemy of this respondent and of the United States of America, and that by reason of such war the said policy became null and void.

Further answering the said bill of complaint, this respondent alleges that the said A. S. Brown, at the time of the commencement of said war, and thereafter during its continuance as aforesaid, was a citizen and resident of the said State of Mississippi, and in violation of his duty and allegiance to the United States of America adhered and gave his allegiance to the said State of Mississippi and the so-called Confederate States of America, and became and was a public enemy of the United States of America and of this respondent; and that by reason of the premises the agency of the said Brown, which had there-
75 tofore existed, and by which for certain purposes he was authorized to act for this respondent, ceased and determined.

Further answering said bill of complaint, this respondent alleges that any claim or pretended claim which the said plaintiffs have or claim to

have against this respondent by reason of the policy aforesaid is one enforceable in the courts of law of the State of Mississippi and of the courts of the United States of America, where this respondent is entitled to have the said pretended claim heard and tried before a jury, and this respondent claims and insists that this court has no jurisdiction to enquire into and decide the said claim or pretended claim.

Further answering said complaint, this respondent alleges that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations in the said bill of complaint contained not hereinbefore admitted or answered unto, except the allegation in said bill of complaint that it has not paid, and refuses to pay, the amount claimed in and by the said bill of complaint to be due to the complainants herein for and on the said policy of insurance, which allegation
76 it admits.

This respondent therefore prays the judgment of this court that the said bill of complaint be dismissed with costs. That the new matters stated in this answer may be taken as a cross-bill as against said complainants, and that they be required to answer the same upon their respective corporal oaths.

MORRIS FRANKLIN,
President New York Life Ins. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

Morris Franklin, president of the New York Life-Insurance Company, respondent above named, being duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

MORRIS FRANKLIN.

Sworn to before me this 11 day of April, 1872.
[L. S.] J. B. NONES,
Commissioner of the State of Mississippi for New York,
No. 91 *Duane street, cor. Broadway.*

Filed April 15, 1872.

MURRAY PEYTON, *Clk.*
By CHAS. CLARKE, *D. C.*

77 To the Hon. E. W. Cabaniss, chancellor of the sixteenth chancery district of the State of Mississippi, presiding, in the chancery court for the second district of Hinds County, in said chancery district.

The joint and several answers of Benjamin G. Humphreys and Livingston Mims to the original bill of complaint of W. C. Statham et al. *vs.* The New York Life-Insurance Company et al., No. 235, now pending in said chancery court.

These respondents, saving, &c., for answer to said bill of complaint, or to such portions thereof as they are advised it is necessary for them to make answer unto, answering say, they admit that said Humphreys, Mims, and J. G. Milligan were, on the 3rd day of September, 1868, the resident agents of and for said New York Life-Insurance Company in the State of Mississippi, having their principal office at the city of Jackson, in said State of Mississippi, and that as such agents they had in their possession in the State of Mississippi money, choses in action,

and other property and effects belonging to said New York Life-Insurance Company.

78 Further answering, said respondents say that, inasmuch as their said agency commenced after the death of Augustine Davis Statham, as alleged in said bill of complaint, they have no knowledge as to the remaining allegations of said bill of complaint, and especially no knowledge as to the said insurance of the life of said Augustine Davis Statham, or as regards any tender of the premium due on the 8th day of December, 1861, the said policy for the insurance of his life, or as to the time or cause of the death of said A. D. Statham, or as to the death of said Mrs. Lucy B. Statham, or as to who are the heirs of said Lucy B. Statham, nor as to the time when said A. S. Brown was appointed agent for said New York Life-Insurance Company, or when his said agency ceased or was revoked.

And having fully answered, &c., said respondents pray to be hence dismissed with their reasonable costs, &c.

BENJ. G. HUMPHREYS.
T. J. AND F. A. R. WHARTON,
Sols. for Respondents.

STATE OF MISSISSIPPI, *Warren County:*

79 Personally came before me, Jacob Adler, a justice of the peace in and for said county, Benjamin G. Humphreys, who, after being by me duly sworn upon his oath, says that the matters stated in the foregoing answer are true according to the best of his knowledge.

Given under my hand and seal on this the 10th day of April, 1873.

[L. S.] J. ADLER,
Justice of the Peace.

THE STATE OF , *County:*

Personally came before me, ———— ————, Livingston Mims, who, after being by me duly sworn upon his oath, says that the matters stated in the foregoing answer are true according to the best of his knowledge.

Given under my hand and seal on this the day of April, 1872.

Filed April 15th, 1872.

MURRAY PEYTON, *Clk.*
By CHAS. CLARKE, *D. C.*

80 OFFICE OF THE NEW YORK LIFE-INSURANCE COMPANY,
No. 68 *Wall Street, New York, December* 26, 1849.

ALFRED S. BROWN, Esq., *Grenada, Miss.:*

DEAR SIR: By a communication this day received from our friend Jno. R. Church, esq., we are advised of your selection as an agent for our company at your place. We are pleased with this arrangement in the hope that it may eventually prove one mutually advantageous. Please find enclosed herewith our usual printed instructions and an appointment for yourself and Dr. Snider, the latter of which please deliver at convenience. We will endeavor in a few days to put you in possession of a sufficient number of blank forms of application, &c., which will qualify you to commence operations. With our best wishes for your and our success in this movement, I am, with great respect,

Your ob't servant,

MORRIS FRANKLIN, *Prest.*

87 *Bill of costs.*

W. C. STATHAM ET AL.
vs.
NEW YORK LIFE-INSURANCE COMPANY.

Cost bill, chancery clerk, issuing 1 writ, certificate, and seal, at 1.50; docketing (2), at 25 cts		$2 00
Entering sheriff's return at 25 cts.; taking appeal-bond to clerk, $1.25		1 50
Filing 18 papers, at 10 cts.; entering suit, 25 cts.		2 05
Entering 4 appearance', at 25 cts.; 1 rule, 1 motion, 4 orders, at 25 cts		2 50
2 continuance', at 25 cts.; 1 order publication and copy, at 1.50		2 00
Setting cause down for hearing, at 25 cts		25
Judgment on demurrer, 50 cts.; recording decree, 25c		75
Taxing cost at 50 cts. twice, and copies		1 50
Decree, at 15 cts. per 100 words for transfer to United States court		2 50
Clerk Lindsey, payable to Deputy Clerk B. F. Edwards.	$8 40	
Clerk Peyton	6 65	
Clerk Peyton, for transcript of record of suit on transfer to circuit court United States for southern district of Mississippi	$30 00	
		45 05

MURRAY PEYTON, *Clerk.*

Sheriff's costs.

Sheriff, for serving writ of summons on 3 def'ts, at $1.50, and for 3 copies thereof, at 50 cts. each	6 00	
Entering and returning said writ	50	
Sheriff's costs		6 50
Total costs to clerk and sheriff		$51 55

88 My fee, $30.00, for transcript of record on transfer of case to circuit court of the United for southern district of Mississippi, this day paid to me by the New York Life-Insurance Company, and same not to be collected except for benefit of said insurance company.

Ray, Mississippi, July 1st, 1872.

MURRAY PEYTON, *Clerk.*

STATE OF MISSISSIPPI, *Hinds County:*

I, Murray Peyton, clerk of the chancery court in and for said county and State, do hereby certify that the foregoing one hundred and three pages contain a true and perfect transcript of the record in the case of W. C. Statham et al. vs. New York Life-Insurance Company et al. as the same appears in my office, and a correct bill of the costs in said suit.

Witness my hand and seal of office at Raymond this 1st day of July, A. D. 1872.

[L. S.] MURRAY PEYTON, *Ch'y Clerk, &c.*

Governor of the State of Mississippi to all who shall see these presents, greeting:

89 Be it known that Murray Peyton, whose name is subscribed to the annexed certificate, was, on the day of the date thereof, clerk of the chancery court of Hinds County, in the State of Mississippi; that his attestation to the annexed instrument, in writing, is in due form of law, and made by the proper officer, and that full faith and credit are due to all his official acts.

In testimony whereof I have caused the great seal of the State to be hereunto affixed.

Given under my hand at the city of Jackson this 11th day of Nov'r, A. D. 1872.

[L. S.] R. C. POWERS.

By the governor:

JAMES LYNCH, *Secretary of State.*

Twenty dollars on a/c cl'k's fees, deposited for defendant Nov. 4, 1872, and transcript filed Nov. 4, 1872.

GEO. T. SWANN, *Clerk.*

90 And afterwards, to wit, on the 9th day of November, 1872, the following motion was filed and entered in this cause, to wit:

Circuit court of the United States, southern district of Mississippi.

W. C. STATHAM ET AL.
vs.
NEW YORK LIFE-INSURANCE COMPANY. } No. 179.

Complainants herein move the court to strike from the files of this court a record filed herein on Nov. 4, 1872, purporting to be a record of the proceedings, &c., in this cause from the chancery court of Hinds County.

NUGENT AND YERGER, *Sol's.*

Filed and ent'd Nov. 9, 1872.

GEO. T. SWANN, *Clk.*

And thereupon on said 9th day of November, 1872, the same being a day in the November term, 1872, of said circuit court of the United States, the following order was made in this cause by said court and entered on the minutes thereof, to wit:

W. C. STATHAM ET AL.
vs.
N. Y. LIFE-INS. CO. ET AL. } No. 179.

91 Ordered by the court, the clerk deliver the files in this case to J. R. Yerger, sol. for complainants, which is done. And the motion of complainants to strike the record from the files is overruled, and leave is granted defendants to complete the certificates to said record now on file.

And afterwards the following motion was filed and entered in this cause, to wit:

In the circuit court of the United States for the southern district of Mississippi. Chancery.

W. C. STATHAM ET AL.
vs.
NEW YORK LIFE-INS. CO. } 179.

The complainants move the court to set this cause for final hearing, the time within which testimony is allowed to be taken having elapsed.

NUGENT AND YERGER,
For Motion.

And on the 29th day of January, 1873, a day in the November term, 1872, of said court, the following order was made by said court in this cause, to wit:

W. C. STATHAM ET AL.
vs.
NEW YORK LIFE-INS. CO. } 179.

92 On application of the defendants, and for cause shown, it is ordered that the time for taking testimony in this cause be extended to 15th March next.

And again on the 27th day of February, 1873, the following other order was made in this cause by said circuit court of the United States, and entered upon the minutes thereof, to wit:

W. C. STATHAM ET AL.
vs.
NEW YORK LIFE-INS. CO. } N. S. 179.

On application of the defendants, and by consent of the sols. of complainants, a further extension of time until the 15th day of April next is granted the defendant within which to take testimony in this case.

93 And on the 13th day of May, 1873, the following was entered on the hearing-docket of said court, to wit:

Circuit court United States, southern district Mississippi.

W. C. STATHAM ET AL.
vs.
NEW YORK LIFE-INSURANCE CO.

The clerk of this court will set this cause down for final hearing on bill, answer, exhibits, pleadings, and proof.

NUGENT AND YERGER.

Ent'd May 13, 1873.

GEO. T. SWANN, *Clk.*

And again on the 20th May, 1873, the following was entered on the hearing-docket of said court, to wit:

Circuit court United States, southern district Mississippi.

W. C. STATHAM ET AL.
vs.
NEW YORK LIFE-INSURANCE CO. } No. 179.

The clerk of this court will set this cause down for final hearing on bill, answer, exhibits, and pleading, and proof.

NUGENT AND YERGER.

Ent'd May 20, 1873.

GEO. T. SWANN, *Clk.*

94 And at the May term, 1873, on the 27th day of May, 1873, the following order was made in this cause by said circuit court of the United States and entered upon the minutes thereof, to wit:

WM. C. STATHAM ET AL.
vs.
J. G. MILLIGAN ET AL. } In equity. N. S. 179.

Ordered that this cause be, and the same is hereby, remanded from the hearing-docket to rules, and that the parties have leave to take and file additional testimony in the cause for three months from this date.

And on the 28th day of May, 1873, a day of the May term, 1873, of said circuit court of the United States, the following order was made in this cause by said court and entered on the minutes thereof, to wit:

W. C. STATHAM ET AL.,
vs.
NEW YORK LIFE-INS. CO. } N. S. 179.

On motion of defendants, it is ordered that this cause be remanded to rules with leave to both parties to take testimony therein until the first day of October next, so as not to prejudice a trial at the next term of this court.

95 And on the 28th day of October, 1873, this cause was set for hearing on the hearing-docket of said court as follows, to wit:

W. C. STATHAM ET AL.
vs.
NEW YORK LIFE-INS. CO. } N. S. 179.

Set for hearing on bill, answers, exh's, & proofs. Oct. 28, '73.

On the final hearing of this cause in said circuit court of the United States, at Jackson, the following testimony was offered and read to the court, to wit:

The deposition of Morris Franklin on behalf of the defendants.

Circuit court of the United States for the southern district of Mississippi.

W. C. STATHAM ET AL.
vs.
NEW YORK LIFE-INSURANCE COMPANY ET AL. } Notice.

To the complainants in the foregoing cause, or to Messrs. Nugent and Yerger, their solicitors of record in said suit:

Please take notice that Morris Franklin, William H. Beers, Theodore M Banta, and F. G. Scriba will be examined (de bene esse) on

96 the part of the defendants in the above-entitled cause, before John A. Osborne, (a commissioner duly appointed by the circuit court of the United States for the southern district of New York, under and by virtue of the acts of Congress in such case made and provided,) at his office at the United States courts, 41 Chambers street, in the city of New York, on Thursday, the 18th day of April, 1873, beginning at eleven o'clock in the forenoon of that day, at which time and place you are hereby notified to be present and put interrogatories, if you shall think fit.

Dated eleventh day of March, A. D. 1873.

Yours, &c.,

T. J. AND F. A. R. WHARTON,
Attorneys for Defts.

We acknowledge service of the within notice personally and by a copy delivered to us. March 11th, 1873.

NUGENT AND YERGER.

APRIL 10th, 1873.—Pursuant to notice counsel for defendants appear, and none appearing for complainants, the examination proceeds.

J. A. OSBORNE,
U. S. Comm'r.

97 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss :

Be it remembered that on this twenty-second day of May, in the year of our Lord one thousand eight hundred and seventy-three, I, John A. Osborne, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at 41 Chamber street, in the city of New York, in the said southern district of New York, in the State aforesaid, MORRIS FRANKLIN, to testify and the truth to say on the part and behalf of the defendants in a certain suit or matter of controversy, now depending and undetermined, in the circuit court of the United States for the southern district of Mississippi, wherein

98 W. C. Statham et al. plaintiffs, vs. New York Life-Insurance Company et al., defendants, in equity.

And the said Morris Franklin, being about the age of years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Morris Franklin, and he did thereupon depose, testify, and say as follows, viz:

I am the president of the New York Life-Insurance Company, and have been for over twenty years last past.

The principal and home office of the company is at Nos. 346 and 348 Broadway, in the city of New York. The said company is incorporated by and under the laws of the State of New York, and is a purely mutual life-insurance company.

The premium due on policy No. 7779, on the life of Augustine D. Statham, on the 8th day of December, 1861, was never paid to or received by the defendants, or to or by any person having authority

99 to act for them. By the rules and by-laws of said company no agent of the company has any authority to receive or collect the annual premiums falling due on its policies of insurance without having in his possession for delivery to the assured, or the person making such payment, a receipt for such payment, signed by the president or actuary of said company.

I now produce for annexation to this deposition the form for such receipts which was used by said company in the year 1861, marked Exhibit A, J. A. O.

A. L. Brown, who had been an agent of said company in the State of Mississippi for some years prior to the breaking out of the late war between the North and South, was not at the time said premium (falling due on the 8th day of December, 1861) was payable, in possession of any receipt therefor signed by either the president or actuary of said company.

A. L. Brown ceased to be an agent of said insurance company on the 16th day of August, 1861, and thereafter had no authority given him to act in any respect for or on behalf of said company.

100 There was never any contract, understanding, or agreement of any nature or description whatever between said company and Augustine D. Statham, or Lucy B. Statham, the beneficiary named in said policy of insurance, or any person on their or either of their behalf, by which the said company agreed or undertook or were bound to keep and maintain an agent in the State of Mississippi or elsewhere to whom said premiums falling due on said policy of insurance might be paid.

MORRIS FRANKLIN.

EXHIBIT A, J. A. O.

New York Life-Insurance Company.

POLICY No. . $. { Cash, 60 p. c. / Note, 40 p. c. 186 . / Int. on notes, . }

Received the sum of dollars, in full, for premium on policy numbered as above, on life of , for $, to , 186 .

Exhibit A, J. A. O.

(Written on margin:) Not valid unless countersigned by—

(Written across the face:) Premiums not paid when due, according to the terms of the policy, annuls the same; but it may be renewed at the home-office within a reasonable time, upon satisfactory evidence of good health being furnished.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Osborne, a commissioner duly appointed by the cir-
101 cuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do

hereby certify that the reason for taking the foregoing deposition is, and the fact is, the witness is material and necessary in the cause in the caption of the said deposition named, and that he lives in the State of New York, a greater distance from the place of trial of the above cause than one hundred miles.

I further certify that a notification of the time and place of taking the said deposition, signed by solicitors for defendants, was made out and served on the solicitors for complainants, and by them admitted due service, which said notice is annexed to said deposition, to be present at the taking of the deposition, and to put interrogatories, if he or they might think fit.

I further certify that on the 22nd day of May, in the year of
102 our Lord one thousand eight hundred and seventy-three, I was attended by counsel for defendants, (no one appearing for complainants at the time mentioned in the notice, nor at any of the adjournments made by commissioner,) and by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of the witness and from his statement, and after carefully reading the same to witness he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing up, and directed the same with my own hand to the court for which the same was taken.

And I do further certify that I am not of counsel or attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand and seal this twenty-second day of May, in the year of our Lord one thousand
103 eight hundred and seventy-three, and of the Independence of the United States the ninety-second.

[L. S.] JOHN A. OSBORNE,
United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York in the Second Circuit.

And thereupon afterwards, to wit, on the 28th day of November, 1873, the same being a day in the term of our said circuit court of the United States for the southern district of Mississippi, begun and held at Jackson, in said State and district, on the 1st Monday of November, A. D. 1873, the following order was made by said court in this cause, and entered upon the minutes thereof, to wit:

W. C. STATHAM ET ALS.
vs.
NEW YORK LIFE-INSURANCE CO. ET ALS. } N. S. 179.

This cause having been submitted to the court for final hearing on a former day of this term, and the court being thereof sufficiently advised, and being satisfied that the complainants are entitled to the relief sought, but not being informed of the amount due upon the
104 policy filed with the bill, doth order, adjudge, and decree that the papers in this cause be, and the same are hereby, referred to Archy McGehee, a commissioner of this court, to take and state an account of the amount due the complainants upon the following basis: The commissioner will deduct from the amount stated in said policy the premium of two hundred and eight $\frac{50}{100}$ dollars, due on the 8th day of December, A. D. 1861, and upon the balance will calculate interest at

the rate of six per centum per annum from a day after the termination of the late rebellion and sixty days after due notice and proof of the death of Augustine Davis Statham.

R. A. HILL, *Judge.*

And thereupon, on the 28th day of November, 1873, the following report of A. McGehee, commissioner in this cause, was filed, to wit:

In the circuit court of the United States for the southern district of Mississippi.—In equity.

W. C. STATHAM ET ALS.
vs. } 179.
NEW YORK LIFE-INSURANCE CO. ET ALS.

105 To the honorable the judges of the circuit court of the United States sitting in equity for the southern district of Mississippi:

The undersigned commissioner, to whom the papers in the above-entitled cause were referred to state an account of the amount due complainants, respectfully reports: That upon an examination of the pleadings in the cause he finds it admitted that "soon after the termination of the late civil war" due notice and proof of the death of Augustine Davis Statham was given by complainants to the said New York Life-Insurance Company, and, allowing all the necessary time to have given this notice, your commissioner fixes the date at which the sum specified in said policy became due, according to the tenor thereof, and the decree of your honorable court, to be on the first day of January, A. D. 1866, and therefore computes his account as follows:

January 1, 1866. Am't due policy 7779	$5,000 00
Less premium due Dec'r 8, 1861	208 50
Balance due	$4,791 50
Nov. 28, 1873. Int. to date, 6 %, 7 y'rs, 10 mo's, 27 d	2,273 56
To bal. due Nov. 28, '73	$7,065 06

Respectfully submitted.

A. McGEHEE, *Comr.*

Filed Nov. 28, 1873.

GEO. T. SWANN, *Clk.*

106 And now afterwards, to wit, on the 29th day of November, 1873, the same being another day in the term of said circuit court of the United States for the southern district of Mississippi, begun and held in the court-room at Jackson, in said State and district, as set forth in the caption hereof, on the 1st Monday of November, A. D. 1873, the following final decree was rendered in this cause by said court and entered upon the minutes thereof, to wit:

W. C. STATHAM ET ALS.
vs. } 179.
NEW YORK LIFE-INSURANCE CO. ET ALS.

This cause having heretofore been submitted to the court upon the record thereof from the State chancery court, and the pleadings and

issues therein made up, as well as the proof since taken, and now coming up for final determination upon said record and proof, and the report of Archy McGehee, commissioner, showing the amount due the complainants on the life policy No. 7779, filed with the bill as of the 28th day of November, 1873, to be the sum of seven thousand and
107 sixty-five dollars and six cents, which said report is hereby in all things ratified, approved, and confirmed, and the court being satisfied that the complainants are justly, equitably, and legally entitled to the relief prayed, doth order, adjudge, and decree that the complainants do have and recover of the defendants, the New York Life-Insurance Company, the said sum of seven thousand and sixty-five $\frac{06}{100}$ dollars, with interest thereon from the 28th day of November, 1873, and the costs of this cause to be taxed. And it is further ordered, adjudged, and decreed by the court that the said complainants do have and recover of the defendants, Benjamin G. Humphreys, J. G. Milligan, and Livingston Mims, the garnishees herein, the said sum of seven thousand and sixty-five $\frac{06}{100}$ dollars, with interest at six per centum per annum from the said 28th day of November, 1873, and the costs of this cause to be taxed. And it is further ordered, adjudged, and decreed that unless the said sum so adjudged to be due to the complainants is paid within twenty days, execution may issue herein in their favor and against the defendants.

Ordered, adjudged, and decreed this 29th day *day* of November, A. D. 1873.

R. A. HILL,
Judge, &c.

108 And on the 29th day of November, 1873, the following order granting an appeal was made by said court and entered on the minutes thereof, to wit:

W. C. STATHAM ET AL.
vs.
NEW YORK LIFE-INSURANCE CO. } No. 179. In chancery.

The defendant, feeling aggrieved by the final decree entered in this cause, appeared in open court and prayed an appeal to the next term of the Supreme Court of the United States, which is granted, to operate as a supersedeas upon his entering into bond conditioned according to law within sixty days from this date, with two good securities, in the penalty of double the amount of said decree, said security to be approved by the judge of this court.

And on the 26th of January, 1874, the following appeal-bond was filed in this cause, to wit:

Know all men by these presents that we, the New York Life-Insurance Company, a body-corporate, duly incorporated under the laws of the State of New York, and having its principal place of business
109 in the city of New York, and the Mississippi Valley Bank, the stockholders of which are citizens of the State of Mississippi, and Thomas J. Wharton and Thomas Green, all residing in the southern district thereof, are held and firmly bound unto William C. Statham and Parmelia A. Dudley, formerly Parmelia A. Statham, of said State of Mississippi and their certain attorney, executors, administrators, and assigns, in the sum of fourteen thousand one hundred and thirty dollars, (14,130,) current money of the United States, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and adminis-

trators, and the successors of said body-corporate, jointly and severally, firmly by these presents. Signed by Morris Franklin, who is president of said New York Life-Insurance Company, who has by due authority of said body-corporate hereto affixed the common seal of said body-corporate, and the two other obligors, also named, have affixed their names and seals the fifth day of January, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately at a circuit court of the United States held at the city of Jackson, in and for the southern district of Mississippi, in
110 a certain suit on the equity side of said court, between the aforesaid William C. Statham and Parmelia A. Dudley, formerly Parmelia A. Statham, co-plaintiffs, and the said New York Life-Insurance Company, Benjamin G. Humphreys, James G. Milligan, and Livingston Mims, defendants, on the 29th day of November, 1873, a final decree was rendered in favor of said complainants against said defendants for the sum of seven thousand and sixty-five $\frac{06}{100}$ dollars, (7,065.06,) with interest at the rate of six per cent. per annum from the 28th day of November, 1873, and the said defendants, feeling aggrieved thereby, applied in open court, on the day of the rendition of said decree, for an appeal to the next term of the Supreme Court of the United States to be held in the city of Washington on the 2nd day of October, 1874, to revise and reverse said decree, and which appeal was thereupon then and there granted upon the condition that said defendants should within sixty days from the date of said final decree enter into bond in double the amount of said decree, with two good sureties, to be approved by the judge of said court, and the said defendant having filed a citation in the clerk's office of the court in which said decree was rendered, directed to said
111 William C. Statham and said Parmelia A. Dudley, formerly Parmelia A. Statham, citing and admonishing them to be and appear before the Supreme Court of the United States at the time and place mentioned above.

Now, the condition of this obligation is such that, if the said New York Life-Insurance Company, Benjamin G. Humphreys, James G. Milligan, and Livingston Mims, (defendants,) shall prosecute the said appeal to effect, and answer all costs and damages if they fail to prosecute their said appeal with effect or successfully, then the above obligation to be void; else to remain in full force and virtue.

MORRIS FRANKLIN, *Pres't.* [L. S.]
WM. H. BEERS,
Vice-Pres't and Actuary.
GEO. M. KLEIN,
Cashier for Mississippi Valley Bank. [SEAL.]
J. T. WHARTON. [SEAL.]
THOMAS GREEN. [SEAL.]

I approve the above bond.
Jan'y 26th, 1874.

R. A. HILL,
Judge, &c.

STATE OF NEW YORK,
City and County of New York:

112 Be it remembered that on this fifth day of January, A. D. 1874, before me, the undersigned, Ferd'n R. Anderson, a commissioner for the State of Mississippi in and for New York, duly commissioned and sworn, and dwelling in the city of New York, personally appeared Morris Franklin, the president, and William H. Beers, the vice-presi-

dent and actuary, of the New York Life-Insurance Company of New York City, to me respectively personally known to be such, who, being by me now duly sworn and affirmed, did each for himself depose and say that he, the said Morris Franklin, resides at Flushing, on Long Island, and the said Wm. H. Beers in the city of New York, and said Morris Franklin was the president, and the said Wm. H. Beers was the vice-president and actuary, of the said New York Life-Insurance Company; that they know the corporate seal of the said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the board of trustees of said company, and that they severally signed their names thereto by the like order as president and vice-president and actuary of the said company respectively;

113 and the said Morris Franklin and Wm. H. Beers, being known to me to be the identical persons above described, also hereby acknowledged to me that they executed the foregoing instrument as the voluntary act and deed of the said company; also severally acknowledged to me that the said instrument of writing by them signed and executed as aforesaid was the free and voluntary act and deed of the said company, for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal at New York, this fifth day of January, in the year one thousand eight hundred and seventy-four.

[L. S.]

FERD'N R. ANDERSON,
Commissioner for Mississippi in City, County, and State of New York.

THE STATE OF MISSISSIPPI, *Warren County:*

Personally came before me, H. N. Martin, a notary public for said county and State, George M. Klein, who, after being by me duly sworn upon his oath, says as follows: That he is the cashier of the Mississippi Valley Bank, which is a banking corporation duly chartered, &c., and having its place of doing business in the city of Vicksburg, in the

114 State of Mississippi; that, as such cashier, and under and by virtue of authority duly granted to him as such by the board of directors of said bank, duly entered on the minutes of the proceedings of said board of directors, he signed the foregoing bond; that, after the payment of its just debts and legal liabilities, said Mississippi Valley Bank has, in the State of Mississippi, assets liable to sale under execution, and over and beyond all property exempt from sale under the laws of said State, exceeding in value the sum of fourteen thousand one hundred and thirty dollars, ($14,130.00.)

GEO. M. KLEIN,
Cashier for Mississippi Valley Bank.

Sworn to and subscribed before me on this the 23rd day of January, 1874.

Witness my hand and seal.

[L. S.]

H. N. MARTIN,
Notary Public.

THE UNITED STATES OF AMERICA,
Southern District of Mississippi:

Personally appeared before me, W. H. H. Green, notary public in and for the city of Jackson, in said State, Thomas J. Wharton and Thomas Green, whose genuine signatures are attached to the within bond for appeal in the case of W. C. Statham et al. vs. New York Life-Insur-

115 ance Company, who acknowledged that they signed, sealed, and delivered the said bond as their act and deed, on the day and year and for the purposes therein specified, and the said Wharton and Green, being by me duly sworn, did depose and say as follows: The said Wharton, that he is worth in property, situated in the said southern district of Mississippi, subject to execution, and over and above all his legal liabilities, the sum of five thousand dollars; and the said Green, that he is worth, as above, in similar property situated as above, and over all exemptions and liabilities, the sum of fifteen thousand dollars.

T. J. WHARTON.
THOMAS GREEN.

Sworn to and subscribed this 26th Jan'y, 1874.

[L. S.] W. H. GREEN,
Notary Public.

Filed Jan'y 26*th*, 1874.

GEO. T. SWANN, *Clk.*

116 UNITED STATES OF AMERICA:

Circuit court of the United States for the southern district of Mississippi.

I, George T. Swann, clerk of said court, do hereby certify that the preceding one hundred and fifteen pages contain a full, true, and perfect transcript of the record of a cause lately pending in said court in chancery, wherein Wm. C. Statham et al. were complainants, and the New York Life-Insurance Company was defendant, No. 179, N. S.; also true copies of the petition for appeal, and the appeal-bond filed therein, as the same remain of record and on file in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office at Jackson, in said State and district, this the 11th day of June, A. D. 1874.

[SEAL.] GEO. T. SWANN, *Clerk.*

Clerk's fee: Transcript, $26.45; certificate, 25—$26.70.

(Indorsement on cover:) No. 462. The New York Life-Insurance Co., appellant, vs. William C. Statham and Parmelia A. Dudley, formerly Parmelia A. Statham. S. Mississippi C. C. U. S. Filed 8th August, 1874.

BRIEF FOR THE INSURANCE COMPANY

In Nos. 217 and 218.

Supreme Court of the United States.

THE NEW YORK LIFE INSURANCE CO.,
APPELLANTS.

vs.

WILLIAM C. STATHAM and PARMELIA A. DUDLEY,
APPELLEES.

No. 217.

MATT. H. CARPENTER,
J. A. GARFIELD,
HENRY E. KNOX,
JULIEN T. DAVIES,
Of Counsel.

M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

BRIEF FOR THE INSURANCE COMPANY

In Nos. 217 and 218.

Supreme Court of the United States.

THE NEW YORK LIFE INSURANCE CO., Appellants,

vs.

WM. C. STATHAM and PARMELIA A. DUDLEY, Appellees.

No. 217.

STATEMENT OF THE CASE.

On 3d of September, 1868, appellees, as heirs at law of Lucy B. Statham, deceased, filed their bill of complaint in the chancery court for the first district of Hinds county, Mississippi, against appellants and J. G. Milligan, B. G. Humphreys and L. Mims, as their agents in Mississippi, having funds of appellants in their possession, to recover $5,000 as the amount due by appellants on a policy of insurance issued by them December 8th, 1851, on the life of Dr. Augustine Davis Statham in favor of his wife, Lucy B. Statham, making the policy of insurance an exhibit to and part of said bill.

Appellants filed a demurrer to this bill of complaint. The cause was transferred to the chancery court for the second district of said Hinds county, and that court sustained this demurrer.

An appeal was prosecuted to the Supreme Court of Mississippi, where, on the 22d day of January, 1872, (Record, p. 12,) the decree of the chancery court was reversed and the cause remanded, with leave to the present appellants to answer. (45 Miss. Rep., 581–600.) The cause was subsequently transferred to the circuit court of the United States for the southern district of Mississippi, in equity, and was finally heard and decided by that court on the bill, answers, exhibits, and the depositions of A. S. Brown and Morris Franklin, and on the 29th of November, 1873, the decree was rendered from which the appeal in this case has been prosecuted.

By this decree appellants were required to pay to appellees $7,065.06 as the balance, including interest, due on the policy, after deducting $208.50 as for the premium which was due and unpaid on the 8th of December, 1861. (Record, pp. 37 to 38.)

Bill of Complaint.

The bill sets forth that said policy was issued in consideration of the payment of $208.50 on the 8th of December, 1851, and of an annual payment of a like amount to be made on the 8th day of December of each year during the continuance of said policy. (Record, p. 2.) That said insurance was to commence on the 8th day of December, 1851, at noon, for the term of the natural life of the assured; that $5,000 was to be paid to said Mrs. Statham or her legal representatives within sixty days after due notice and proof of the death of said A. D. Statham.

The bill also alleges that "it was also understood and agreed *as part of said policy in case said Mrs. Lucy B. Statham should not pay the premium as aforesaid on or before the several days mentioned in said policy for the payment thereof, then, and, in every such case, the said company shall not be liable to the payments of the sum insured, or any part thereof, and that said policy should cease and determine*, (Record, p. 2;) that all payments of premiums on this policy up to and inclusive of that due on the 8th of December, 1860, had been

to A. S. Brown as the agent of said insurance company; that the premium due on the 8th of December, 1861, was not paid because, in consequence of the civil war and the non-intercourse act of Congress, it was unlawful for complainants to pay this, or for the insurance company to receive it; that this war commenced in April, 1861, and continued until 1866, and the State of Mississippi was during such war one of the Confederate States, and was engaged in war against the United States; nevertheless complainants did everything in their power to pay the premium on this policy on the 8th day of December, 1861, and then offered to pay it to A. S. Brown, as agent, but he refused to receive it, because it was unlawful for him to receive it, and because *he had not been furnished by said company with proper receipts to be used on receiving said payment;* (Record, p. 3;) that A. D. Statham and Mrs. Lucy B. Statham continued to be citizens of Mississippi from the issuance of said policy until their respective deaths; that she died in October, 1856, and that he died on the 20th day of July, 1862, (Record, p. 3;) that during all this time said insurance company was a citizen and resident of the State of New York, having its domicile and place of business in New York, (Record, p. 3;) that shortly after the termination of said war complainants gave due notice and furnished proof of the death of said Augustine Davis Statham, and called upon said insurance company for payment of said insurance money, when said company refused to pay the same, and claimed that said policy became forfeited by the non-payment of the premium money due on the 8th day of December, 1861, (Record, pp. 3–4,) but complainants deny it was so forfeited because such payment was prohibited by law." (Record, p. 4.)

The policy of insurance in this case is in the usual form of a policy of insurance for the term of the life of the assured. (Record, pp. 5–6.) Besides the provision recited in the bill of complaint as to forfeiture for non-payment of any annual premium, this policy contained another provision for its forfeiture, in these words:

"*Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by*

the assured upon these express conditions, that in case the said Augustine D. Statham shall, without the consent of the company previously obtained and indorsed upon this policy, pass beyond," &c., * * * *"or shall, without such previous consent thus indorsed, enter into any military or naval service whatever, (the militia not in actual service excepted,) or in case he shall die in or in consequence of a duel, or by the hands of justice, or in the known violation of ang law of the United States or of any State or country, or in case his death shall be caused by intoxicating drink or opium, this policy shall be void."* (Record, pp. 5–6.)

It is unnecessary to refer to the grounds of demurrer to this bill, as the most material of them are relied upon in the answer of the insurance company.

Answer of the Insurance Company.

The answer admits the allegations of the bill in reference to the issuance of the policy, and the payments of premiums thereon previous to the one due December 8th, 1861, but declares that, by the terms of said policy, the payment of the annual premium due on the 8th day of December, 1861, was a condition precedent to the continued existence of the policy after that day, the non-payment was, by the provisions of the policy, a forfeiture of such policy; (Record, p. 24;) that Brown had ceased to be an agent of said company several months previous to the 8th of December, 1861, and was not such agent on that day for any purpose whatever; (Record, p. 4;) that it was not required by said policy, nor by any agreement with said A. D. Statham, nor by any law of the State of New York, or of the State of Mississippi, that said insurance company should keep any agent in Mississippi to receive the premiums payable on this policy; but said company permitted said premiums previous to that of December 8th, 1861, to be paid to said Brown as a matter of favor and convenience to said Augustine Davis Statham, *and not as a matter of right;* (Record, p. 24;) that the said company is a mutual life insurance company, and said Augustine Davis Statham, so long as he complied with the terms and conditions of said policy, and until the breaking out of the war, set forth in bill of complaint, was a member of said corporation, and bound by all the laws,

by-laws, rules, regulations, and customs thereof; and that one of these rules was "*to the effect that no agent of said company has any authority or right to collect or receive the premiums due or to become due on the policies issued by said company unless the said agent had received from the company for delivery to the policy-holders paying such premium a receipt for the same, signed by the President, Vice President, or Actuary of said company;*" (Record, p. 24;) and that A. S. Brown had no such receipt for the premium due on this policy on the 8th of December, 1861, if the same had continued in force; and, without such receipt, he had no power to accept or receive the payment of such premium or a tender thereof. (Record, p. 25.)

The answer admits the statements of the bill as to the secession of the State of Mississippi; the commencement and termination of the war; the passage by Congress of the non-intercourse act, by which it was unlawful to pay or receive the premium on the 8th December, 1861; that during all this time, and up to his death, complainant was a citizen of Mississippi and said insurance company was a citizen of New York. But complainant, without violating any law of the United States, could have changed his residence to some State not engaged in war against the United States, and, had he so desired, could have paid said premium to said insurance company. By reason of the non-payment of this premium this policy of insurance became void. By reason of his continued residence in Mississippi, and his adherence to that State, before the 8th of December, 1861, complainant became a public enemy of the United States and of said insurance company; and it thereby became unlawful for said company to insure his life or to continue its insurance, and by reason of such war said policy became void. For the same reason said A. S. Brown became an enemy of the United States and of said company, and by reason thereof his agency "ceased and determined." (Record, p. 25.)

Cross-Bill and Answer.

The new matters in this answer were pleaded by way of a cross-bill, and were answered by appellees. Their answer is

to the same effect as their bill of complaint, and alleges that Brown's agency was general and continuing, and was never revoked; that on the 8th of December, 1861, he was such agent, and authorized to receive premium moneys; that it was the mutual understanding that premium receipts were to be furnished to the agents in Mississippi, "unless they gave notice to the contrary," (Record, p. 28,) and no such notice was ever given. If unlawful to send such receipts to Mississippi, it was unlawful to send such premium money to New York. (Record, p. 29.) They had no knowledge that the rules of the company prohibit its agents from receiving premium money without being furnished by the company with the proper receipts to be delivered therefor. (Record, p. 29.) A. D. Statham never was engaged in the military service of Mississippi or of the Confederate States, but *his interests, feelings, and sentiments were with the people of his State in that struggle, since his kindred were in the military service of the Confederate States.* (Record, p. 29.)

TESTIMONY.

A. S. Brown testifies that he was agent for the insurance company from 1849, and his agency was never revoked; considered himself such agent during the war, and would have acted as such if he had been furnished with proper premium receipts. The company did not give notice after the war commenced that such receipts would not be sent to agents.

Before the 8th of December, 1861, A. D. Statham tendered to him the premium due on that day on his policy of insurance, "*which he did not receive because he was not placed in possession of renewal receipts from the home office.*" (Record, p. 14, 4th answer.) "He offered to pay the same at Granada." * * * No particular amount of money was tendered in payment of said premium as the precise amount was not known to either him or Statham; did not know the kind, character, or exact amount of money tendered. Statham did not count the money in agent's presence, but agent's impression is that Statham had the money in his hand. *He did not offer to pay the premium in gold or silver, and agent cannot*

state whether the money was United States national currency notes, or United States Treasury notes, OR NOTES OF THE CONFEDERATE STATES. (Record, pp. 15–16, answer to 2d cross-interrogatory.) Agents were authorized to receive premium moneys without having the proper renewal receipts, but had no authority to make out such receipts, as these were made out at the home office and sent to agents to be countersigned by them. Company agreed to establish an agency and keep the same for the convenience of those who insured in it. (Record, p. 16.)

The depositions of Morris Franklin, president of the company, sustain the several allegations of the answer filed by him as president of the company, and show that the premium which was payable on this policy on the 8th of December, 1861, was never paid; that by the rules of the company no agent was authorized to receive premium money without having in his possession a receipt therefor, signed by the president or actuary of said company, for delivery on such payment. Written on the margin of such receipt were the words: "Not valid unless countersigned by ——;" and written across the face thereof were these words: "*Premiums not paid when due, according to the terms of the policy, annuls the same; but it may be renewed at the home office within a reasonable time upon satisfactory evidence of good health being furnished.*" That Brown's agency terminated on the 16th day of August, 1861, and he had no authority after that time to act in any respect for said company; there was never any contract, understanding, or agreement with A. D. Statham or Lucy B. Statham, or with any person for either of them, by which the insurance company agreed, undertook, or were bound to keep and maintain an agent in the State of Mississippi or elsewhere to whom said premium falling due on said policy of insurance might be paid. (Record, p. 35.)

ASSIGNMENT OF ERRORS.

We hold that the court erred:

1. In finding that the complainants were entitled to the relief sought in the bill of complaint, notwithstanding the

fact that they did not pay, nor cause to be paid, the annual premium of December 8, 1861, required by the policy as a condition precedent to the continuation of the insurance.

2. In finding for the complainants, notwithstanding the fact that the said policy of insurance had been made void by war.

IN THE SUPREME COURT OF THE UNITED STATES.

THE NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error, *vs.* CHARLOTTE SEYMS. } No. 218.

This cause is brought here by writ of error to the Circuit Court of the United States for the southern district of Mississippi, to which court it was removed from the Circuit Court of Warren county at the July term, 1872, in pursuance of law. It was an action at law brought by the defendant in error to recover the sum of $25,000 on a policy of insurance on the life of her late husband, Henry S. Seyms.

STATEMENT OF FACTS.

On the 23d of December, 1859, the plaintiff in error issued to defendant in error a policy of insurance in the amount of $2,500 on the life of her husband, Henry S. Seyms, of Vicksburg, Mississippi. (Record, pp. 5, 6.)

On the 23d of December the annual premium was paid in full to W. A. Barbour, the company's agent at Vicksburg. (Record, p. 6.)

The annual premium necessary to renew the policy December 23d, 1861, was neither paid nor tendered by defendant in error, nor by any person for her. Defendant in error made no attempt to effect such payment. The company's agent, Barbour, entered the Confederate army as a soldier early in the spring of 1861, and altogether ceased to act as the company's agent. (Record, pp. 33–34.)

Seyms remained within the territory of the Confederacy until his death, which occurred May 28th, 1862. (Record, p. 33.)

The parties, by stipulation, waived a trial by jury, (Record, pp. 11–12,) and upon the evidence submitted, the court found the facts substantially as above stated, and awarded judgment in favor of the defendant in error. (Record, p. 12.)

Assignment of Errors.

We submit that the court below erred:

1. In finding that the plaintiff should recover on the policy notwithstanding the fact that the defendant failed to pay or tender to the plaintiff the annual premium on the 23d of December, 1861.

2. In finding that the defendant should pay to the plaintiff any sum on said policy after the 23d of December, 1861, notwithstanding the fact that said defendant was then an enemy of the United States and within the jurisdiction of the Confederate States.

The questions at law at issue are the same in these two cases, (Nos. 217 and 218,) and the same arguments apply to both.

Points taken by the Insurance Company.

I.

This court is the ultimate tribunal to decide finally and conclusively the questions involved in this case, and the decisions in the State courts, though their reasoning is to be regarded with respect, are not authority.

(1.) Because this is an appeal from a circuit court of the United States, and this court must form its own judgment on every question of public law involved in it.

(2.) Because the United States alone can declare and prosecute war, and the rules of law under which it is to be prosecuted are strictly and wholly laws of the United States, whether those rules are derived from express enactments by Congress or by silent adoption from the lawful existence of war. And being laws of the United States, in the manner above stated, it is for this court ultimately to decide what they are and what is their application to each particular case.

II.

We submit that the interpretation and enforcement of this contract of life insurance contended for by the company, will be decisive of these causes, without reference to the fact of war or to the questions arising from it.

1. The rights of the parties depend upon the contract which they themselves made. The court will not interpolate new conditions, but will hold the parties to their own agreement. (*Dermott* v. *Jones*, 2 Wall., 1, and cases there cited.)

2. The contract of insurance in these cases contains an exhaustive statement, both negative and affirmative, of the terms on which it may be continued, and the grounds on which it may be forfeited. The parties have undertaken to provide for all the contingencies which may perpetuate or destroy the contract.

The contract consists of two parts, and is divisible. The payment of the first premium accomplishes two things: First, it effects an insurance upon the life of the applicant for one year, and in this respect, so far as the insured is concerned, it is an executed contract, so far as the insurer is concerned, it is what has well been called a contract of continuing performance; second, it purchases the option of continuing the insurance from year to year and in respect to the exercise of this option it is an executory contract. This view is very clearly stated by Judge Carpenter, in *Worthington* v. *Charter Oak Life Insurance Company*, (41 Conn., 372,) where the court says:

"The company say, in effect, to the other party: 'Pay at the time stipulated, and you are insured; omit such payment, and our proposition is withdrawn and your right to insure is extinguished.' * * * The payment is in no sense conditional. The proposition is not, pay if convenient, pay unless sudden sickness prevents, pay unless some unexpected turn of fortune deprives you of the means of paying, pay unless the act of God or the law intervenes to prevent payment, but absolute payment is required. To make it still clearer, the proposition is not if poverty, sickness, accident, or the law prevents you, you shall be insured the

same as if you had paid. None of these risks were taken by the company; they were all taken by the insured."

3. The provisions of the policy requiring payment of the agreed premium for the subsequent year have been treated as creating a condition—sometimes a condition precedent, sometimes a condition subsequent. It is submitted that they are not a condition, but an essential part of the substance of the contract by which the risk is limited and defined. The policy itself makes this distinction, and it is one which is not arbitrary, but necessarily grows out of the nature of the business, which could not be conducted without so treating it. (For an elaboration of this proposition, see pages 4 to 9, inclusive, of the argument submitted herewith of Hon. B. R. Curtis in case of Tait *v.* Ins. Co., the last forensic effort of that distinguished jurist.)

The distinction between a condition and a stipulation which is part of the substance of the contract was pointed out by Mr. Justice Bradley in delivering the opinion of this court in the case of *Dean* v. *Nelson*, 10 Wall., 170.

4. But should the court hold that the payment of the annual premiums is to be regarded as a condition, we insist that it is a condition *precedent* to the renewal and extension of the risk.

The English authorities are decisive on this point, and are equally clear in determining that the ordinary contract of life insurance is a contract from year to year or from quarter to quarter. Two cases are especially referred to.

As early as 1810, in the case of *Elizabeth Want et als.* v. *Blunt et als.*, 12 *East*, 183, the character of a policy of life insurance issued by a mutual company which required premiums to be paid quarterly, was fully discussed. That case turned upon the question whether the payment of the quarterly premium required in the policy was a condition precedent to the continued existence of the policy, or whether the insurance was for the life and of the assured, and the payment of quarterly premiums was a condition subsequent. Lord Ellenborough, delivering the opinion of the court, said: "This

is a contract of assurance, and must be construed according to the meaning of the parties, expressed in the deed or policy. It is an insurance on the life of a husband. * * * The *risk* insured against is his death; and the premium is a quarterly payment to be made by him to the society, who are the underwriters during his life. The duration of the insurance is so long as he shall continue to make these quarterly payments. * * The insurance is for a quarter of a year, and so on, from quarter to quarter, and it expires at the quarter day." The authority of this early decision still remains undisturbed in the practice of the English courts.

It has not only been maintained undisturbed, but its principles have been still more broadly applied in the recent cases. In *The Phœnix Life Insurance Company* v. *Sheridan* (8 *House of Lords Cases*, 745) an action had been brought on life policy which was headed with these words: "Annual premium 33*l*, whole term, payable by quarterly installments of 8*l* 5*s*. each."

In the body of the policy it was declared that, "if the assured shall die within twelve calendar months from the date hereof, or shall live beyond such period, and on or before that period, or before every succeeding twelve calendar months, shall pay the annual amount of premium, the insurers shall be liable."

The assured died within twelve calendar months from the date of the policy, and at the time of his death the third quarterly installment was due and unpaid. In the original suit in the Court of Queen's Bench (*Ellis, Blackburn & Ellis*, 156) the plaintiffs insisted that, though the annual payment of premium was a condition precedent to the continuation of the policy, the quarterly payments were not, and failure to meet any of them before the end of the year would not render the policy void. But the court held that the agreement to pay the annual premium in quarterly installments made a contract from quarter to quarter, and any failure to pay rendered it void.

Lord Campbell, C. J., said: "The policy does say that if Blomberg should die before the termination of twelve calen-

dar months from its date the company would be liable, but it adds a condition as to the payment of premium, which, we think, amounts to a condition precedent that the premium shall be paid quarterly."

The cause was taken to the Court of Exchequer Chamber, where the judgment was reversed, the court holding that the policy was an annual insurance; that is, from year to year. (*Ell., Bl. & Ell.*, 160.)

In the House of Lords the judgment of the Court of Exchequer Chamber was reversed, and the judgment of the Court of Queen's Bench sustained by the unanimous opinion of the Law Lords, who held that though the policy was loosely drawn, yet, as the parties had agreed upon quarterly payments, each such payment was a condition precedent to the renewal of the contract.

To the same effect, that the optional payment by the insured of the premiums at the time required by the contract, is a *condition precedent* to the continuation of the insurance. See Law Rep., 9 Ch., 502; Law Rep., 9 Eq., 705; Law Rep., 17 Eq., 316–320; also opinion of Judge Emmons in case of Tate *v.* New York Life Insurance Company, p. 32, (pamph. ed., *et seq.*, and cases there cited.

5. Impossibility to perform a condition precedent does not, *at law*, prevent the loss of that which depends upon performance; nor will a court of equity relieve against the consequences of a breach of condition precedent. It will only relieve against the consequences of a condition subseqent when the sufferer has lost something really valuable, and the party who would be substantially benefitted by the forfeiture can be adequately compensated, and both parties put in the same condition as if the condition had been performed. (*Salk.*, 231–232; 2 *Vernon*, 338, 339, 344; 1 *Vernon*, 223; 1 *Bro. Ch.*, 168.) Impossibility of performance of a condition precedent occasioned by law does not afford ground of relief. Earl of Shrewsbury *v.* Scott, 6 C. B., (N. S.,) 1.

III.

The effect of War upon the Contract of Life Insurance.

The only ground on which the insured claims relief against the consequences of his failure to exercise his option to be reinsured is that at the time for the annual payment of 1861 war existed between the United States and the State of Mississippi, which rendered it *unlawful* for the insured to make payment. Full opportunity was given to the insured to move to a place where he might lawfully pay the annual premiums, if he elected so to do. From the beginning of the war until the Proclamation of the President of the United States of August 16, 1861, forbidding intercourse between the belligerents, there was no obstacle to removal of the insured to loyal territory. And by act of the Confederate Congress of August 6, 1861, (*Confederate Statutes at Large, chap. XIX, p.* 174,) all citizens of the United States who recognized the authority thereof were required to leave the jurisdiction of the Confederacy. The assured was a citizen of the United States, and by its authority he was permitted and invited to withdraw from the enemies' jurisdiction. At the same time the Government of that enemy commanded him to choose between departing as a loyal citizen or remaining as an enemy of the United States.

This court has clearly indicated the duty of a citizen in such a case. (*Mrs. Alexander's Cotton*, 2 *Wall.*, 421; *The William Bagley*, 5 *Wall.*, 377.)

The insured made his election. He remained with the enemies of the United States. He cannot plead the result of his own choice as an excuse for non-payment.

This contract being an executory one, so far as its future was concerned, between those who became enemies in war, requiring an additional and continuing performance on the part of both parties in order to secure its continued existence, was made void by the war, because such additional performance was impossible, without intercourse prohibited by law.

Hanger *v.* Abbott, 6 Wallace R., 536.

Mr. Duer (Duer on Insurance, p. 473, end of note II) has stated the rule with great accuracy.

There could have been no additional performance in this case without unlawful intercourse.

The agent in Mississippi had no authority to receive premiums, in any case, without a special power conferred upon him in each instance, by transmitting to him a receipt for the particular premium, signed by the president or actuary of the company in New York; and this limitation of his authority was known to the assured and assented to by him, because it is set out in the margin of his policy.

The transmission of such receipt from the company in New York to the agent in Mississippi would have been unlawful intercourse. (See pages 3 and 4, argument of B. R. Curtis.)

It is argued that one may have an agent within the enemy's lines qualified to receive payment of a debt.

But this premium was in no sense a debt. It was at the election of the insured, influenced by any cause, whether he would pay or fail to pay. He could never become the debtor of the insurer. If he should fail to pay, the insurer could make no claim upon him. If he should pay, he would simply continue his policy in force.

It should be observed, also, what would be the consequence, in a state of war, of his electing to pay and actually paying to a lawful agent of the insurer.

Before he elects to pay and actually does pay to the agent, the amount of the premium is his money, and not liable to confiscation by that belligerent in whose country he resides. But the payment of that money to an agent of a subject of the other belligerent subjects it at once to confiscation; and whatever may be said against the confiscation of property of persons not belligerent upon the land is merely theoretical, both parties to the late war having passed sequestration acts, and this court, in the case of Miller *v.* The United States, (11 Wall., 268,) upheld such laws.

No such considerations apply to the payment of an existing debt by one enemy to the agent of another enemy. The debt

was equally liable to confiscation before it changed hands as it was afterwards.

We rely specially on the cases of Montgomery *v.* The United States, 15 Wall., 395; The United States *v.* Grossmayer, 9 Wall., 72; Lapene *v.* The United States, 17 Wall., 601.

3. Insurance of the property or lives of enemies violates the laws of war, and all such continuing policies subsisting when war begins become void thereby.

(1.) The policy itself, if a valid and continuing contract, is a valuable security, which increases the resources of the enemy. It is capable of being used as property, and transferred from hand to hand.

(2.) It is settled that insurance on property of the enemy existing at the commencement of the war becomes void. One of the reasons given in the leading case of Furtado *v.* Rogers (3 Bos. and Pull., 191) is, that a contract to indemnify an enemy against loss increases the resources of the enemy and tends to protract the war. And that such a result of a contract is contrary to the laws of war, commends itself to a judgment formed upon the principles which govern this subject.

It has been argued that this principle applies only to property liable to capture or destruction in war. If this were so it would be extremely difficult to find any limit which would exclude any property; for not only may all property be subject to capture and to confiscation, but the march of armies and the siege and destruction of towns, and that necessity of devastating particular portions of the enemy's territory for purposes of war would bring in every species of property, so that the citizen or subject of one belligerent should not have an interest separate from and hostile to his own country from the fact that he had undertaken to indemnify the enemy against such loss.

Nor can there be any well-founded distinction between a promise to indemnify an enemy, or the creditor of an enemy, though a non-combatant, against loss of life.

It increases the resources of the enemy. In case of the

death of one of his citizens or subjects it gives an absolute right to a sum of money. Granting that such money cannot be recovered till the close of the war, still, if it is absolutely due, it is to the extent of its amount the creation of an absolute right.

In this particular case of a mutual life insurance company, the whole body of the stockholders residing in the loyal States, if these policies continued valid, had a direct and immediate interest that the operations of the armies of their country should be so conducted as not to endanger the lives of non-combatants insured in that company. This has a strong and direct tendency to separate the interests and wishes of that body of the citizens of the loyal States from the interests of their country in a state of war.

Upon the questioning before the court in these cases we respectfully refer for a more full discussion of them and for reference in detail to the authority bearing upon them, to the opinions of Judge Emmons, in the case of Tait *v.* Ins. Co., and of Judge Carpenter in the case of Worthington *v.* Charter Oak Ins. Co., (41 Conn.,) and to the briefs filed in this court in the cases of Tait *v.* Ins. Co.; and Mutual Life Ins. Co. *v.* Hamilton, argued in the winter of 1874; of Manhattan Co. *v.* Buck, submitted recently and now under advisement; and of New York Life Ins. Co. *v.* Hendren, No. 213 on the present calendar.

IV.

The decisions upon which the appellees rely seem to have been largely influenced by a disposition to mitigate the supposed hardship of the application of the well-settled principles of law to the policy of life insurance.

1. With the hardship or supposed hardship of the application of these principles to the particular case the court has no concern.

2. The hardship occasioned by the distorted application of well-known principles by the courts, upon whose decisions the appellees rely, seems to have escaped the consideration of those courts.

Practically, it will and has been found to be the case that the claims made against the insurance companies since the war have been made either by the representatives of those who had died during the war or by those whose health was such that they were not proper subjects of insurance. The persons who survived the war in good health have not sought a continuance of their policies. Those who wished insurance upon their lives found it cheaper to take out new policies rather than pay up back premiums with interest.

That the decisions upon which the appellees rely would, in cases of long continued war, bankrupt the companies, and thus destroy the interests of loyal citizens insured in them, is fully shown by the annexed tables prepared by Mr. Shepherd Homans, one of the leading insurance actuaries of the country.

V.

The court will perceive that these cases do not necessarily involve the consideration or determination of that class of cases in which the insured survived the war, and promptly on its termination sought to be reinstated by tendering the back payments with interest. An example of the latter is the recent case of *Bird* v. *The Penn Mutual Life Insurance Company*, in the United States District Court for the eastern district of Pennsylvania, reported in the Philadelphia Legal Intelligencer of February 11, 1876. In his opinion Judge Cadwalader suggests that the conditions, in a case where the insured died before the war ended, would be different from the one before him. Referring to the case of *Tait* v. *The New York Life Insurance Company*, he says:

"The insurance had been upon a life that had ended. There was not, as in this case, a continuing risk; nor was there an option to be prolonged. The option was already gone. The offer of compensation could only, in substance and effect, be a proposed credit in reduction of the amount of money insured. There could be no absolute certainty that, if there had been no war, the person insured would have elected to pay the premium in 1861. His former motives for insuring might have ceased to exist; but on his death his representatives could not, if they had a continuing right of election,

have any possible motive to forbear the exercise of it. Such cases have been compared to an option to buy a lottery ticket, where the election to buy is not made until after the ticket has drawn a prize." (Law Rep., 9 Ch., 503.)

VI.

The judgment and decree under review should be reversed, and judgment absolute rendered for the appellant and plaintiff in error in the respective cases, with costs.

MATT. H. CARPENTER,
JAMES A. GARFIELD,
HENRY E. KNOX,
JULIAN T. DAVIES,
Of Counsel.

Supreme Court of the United States.

W. E. TATE and others, Heirs and Administrator of SAMUEL BOND, deceased,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

ARGUMENT OF HON. B. R. CURTIS FOR THE APPELLEE,

THE NEW YORK LIFE INSURANCE COMPANY.

M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

Supreme Court of the United States.

W. E. TATE and others, heirs and administrator of SAMUEL BOND, deceased,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

ARGUMENT OF HON. B. R. CURTIS FOR THE APPELLEE, THE NEW YORK LIFE INSURANCE COMPANY.

MAY IT PLEASE THE COURT: I regret my inability to have been present during the debate which has occurred in case 228. It exposes me to the risk of repeating things already said, and perhaps of discussing points already sufficiently discussed. I will endeavor to avoid these difficulties as well as I can.

Before I proceed to the argument properly speaking, I desire to draw the attention of the court to a fact which seems to me, in the actual posture of the authorities relied upon in this case, to be of the first importance.

This case turns mainly upon the application of the act of Congress and the President's proclamation, and those rules concerning the prosecution of the war, and the duties of belligerents, which belong to the law of nations. Now, all these matters of law, whether arising from the act of Congress or the President's proclamation, or from those rules of public law concerning the prosecution of war, which were silently adopted by the United States when it entered upon this war—all these are of the laws of nations.

The United States alone can prosecute war. The United States alone can have a jurisprudence modified by acts of

Congress, or silently adopted from the laws of nations by reason of a state of war.

The United States alone can have this jurisprudence, because the United States alone can prosecute war. No State can do so; and, therefore, when the learned counsel on the other side relied on the State decisions, however respectable the court may be which have made them, they are not authority.

This is the ultimate tribunal. Upon this court rests the responsibility of determining what these rules concerning the prosecution of war are, what duties and obligations and and prohibitions they create, and how they shall be applied in each particular case. The court will still look to these decisions of respectable courts to ascertain what their reasoning is, and how far it may be safely followed or applied. I apprehend no further.

I shall not find it necessary, in the remarks I have to make, to say anything concerning these State decisions, with one exception, and the reason is because these decisions have been so fully and ably commented upon in the opinion of Judge Emmons, which is a part of the record in this case. I am entirely satisfied to leave them in the hands of the court with his remarks upon them. There is one exception, to wit, the case in 35 New Jersey, which was not decided at the time he wrote his opinion; and I shall therefore find it necessary to say a few words concerning that decision.

The first position to which I desire to call the attention of the court is that the rights of this company are in nowise influenced or affected by the termination of their Memphis agency in consequence of the war. That the agency was necessarily terminated by the war seems to admit of no question.

That agency was not established by reason of any obligation incumbent upon the company. There is not a word in the contract which leads to any such result. It was established at the will of the company, to promote its own objects and interests. Undoubtedly its own objects and interests would be promoted by local agents, through whom

applications for insurance might be made, or who, within the limits of their authority, could deal with the insured upon any subject arising under the policy. The company would therefore be able to obtain custom to a greater extent by means of the existence of such an agency; and, acting upon these interests and views of their own, they did establish local agencies. Now, this local agency, like all the others of this company, was one of this character. The agent was to receive applications for insurance; he was to transmit them to the office in New York; he was to transmit with them such information as the rules of the company required, in order to enable the company to decide upon the application; he was to keep himself informed, after the policy was issued, as to any forfeiture incurred under the conditions of the policy, by the insured entering into military service, going out of certain geographical limits, as specified in the policy, &c.; and he, keeping himself thus informed, was to give this information to the company.

But he had no authority arising out of his general agency to receive any money for the company. Whatever authority from time to time he derived from the company, to receive money for the company in payment of the premiums, he derived in each specific instance, and in this particular form, namely, in the form of a receipt signed by the president or actuary, transmitted to him as the evidence of his authority to receive that premium. And of this special notice is given in the margin of the policy, it being there declared that the agent has no authority to receive any money, unless upon a receipt signed by the president or the actuary of the company.

Your honors will perceive that the authority to receive premiums for the company was not only not a general authority, but it was a specific authority conferred upon him in each instance, in anticipation of the time when it was expected to be needful for him to act in the premises. Now this being so, can there be the least doubt that, even if this company had been under obligation, we will suppose, by a special contract contained in the policy, to maintain a local agency for the purposes of the company,

war would have abrogated that obligation? Because it would have been an obligation to maintain an agency in the enemy's country, to carry on new transactions between the insured and the insurer, to receive money and remit money. I do not deem it necessary to pause to argue that question. It has been so repeatedly decided by this court that during war no new agency can be created, whatever may be its character, and it being perfectly apparent here that a new agency was to be created each time when a premium was to be paid, that it would be quite in vain to spend time in arguing that the company, even if it desired to do so, or even if it had previously agreed to do so, could not, consistently with the laws of war, have continued to maintain and renew from time to time this agency.

I pass, then, to ask the court to consider *the nature and construction of this contract.*

Two constructions have been proposed. One is that it is an insurance during life, the policy to become void by the non-performance of conditions subsequent to pay the premiums. That is the construction contended for by the claimants.

On the other hand, the construction we ask the court to put upon the policy is that, looking to the nature of the contract and all its provisions, it is an agreement to insure for one year after the payment of the last premium, so long as the insured shall live.

The first clause of this policy reads, that "in consideration of the sum of $224 50 to them in hand paid by Samuel Bond, and of the annual premium of $224 50 to be paid on the 17th day of October, in every year during the continuance of this policy, do assure the life of Samuel Bond, planter, of ———, in the county of Shelby, State of Tennessee, in the amount of $5,000, for the term of his natural life, commencing the 17th day of October, 1854, at noon."

Looking further, we find the policy contains *express conditions*, technical conditions. They are called conditions. They are called express conditions: "Provided always, and it is hereby declared to be the true intent and meaning

of this policy, and the same is accepted by the assured *upon these express conditions.*" Then follow the conditions. He is not to go out of certain geographical limits without the consent of the company. He is not to enter into any military or naval service; is not to die in a duel, or by his own hand, or in violation of any law, or by the use of intoxicating drinks or opium.

These are what are denominated and properly denominated express conditions.

Then follows this, which, whatever else may be said of it, is not characterized by the contract itself as a condition—

"And it is also understood and agreed to be the true intent and meaning hereof, * * * * * that if the said Samuel Bond shall not pay the said premiums on or before the several days hereinbefore mentioned for the payment thereof, * * * * * * then the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine."

Now, may it please your honors, what is the character of this contract? It is a policy of insurance; and an essential requisite of a policy of insurance is that it should *define the duration of the risk which is undertaken;* and if we find in the policy language manifestly inserted for the purpose of defining the duration of the risk taken, that language must have its proper effect. It is not necessary that the risk should be defined in one sentence. It is not necessary that it should be defined without reference to future events, but it must be in some way defined. It may be by taking several descriptive parts of the language together. It may be by reference to future events, as well as to existing facts. However, the risk is defined and limited, whether in one or more sentences, whether by reference to future events or present facts. If it is inserted in the policy for the purpose of limiting the risk, then we are not to resort to the doctrines concerning conditions precedent, or conditions subsequent, or the learning of the common law in regard to excuses for non-performance,

but we are to treat the language as if inserted for the purpose of defining the risk, and we are to allow it to have its just and full effect.

This, I have said, is a policy of insurance. It is a policy of life insurance; but it does not, in the essential particular to which I am referring, differ from any other policy of insurance. This, and all other policies of insurance, must in some way express intelligibly the duration of the risk undertaken; and when it has done so, that is the risk undertaken, and it cannot be increased or diminished without altering the contract. Take, for instance, a marine risk—an insurance from A. to B., and from B. to C. Then, either in the margin or in some other way—for insurers are somewhat careless as to their modes—this is inserted: *Provided*, That if the insured, on or before the arrival of the ship at B., fails to pay the premium for the additional risk to C., the risk is to cease at B.

Did any insurance lawyer ever conceive that you were to inquire into any other fact than the payment of the additional premium? That while that additional premium was not paid, you were to go into an inquiry whether this was a condition precedent or a condition subsequent, and what the bearing of the common law was as to excuses for non-performance? Why, the proviso was inserted for no such purpose. It was inserted to describe and limit the risk, and it was put entirely at the election and at the peril of the insured, whether he should pay that additional premium or not. So in the case of fire insurance. A policy is made on a dwelling house for one year, at an agreed rate of premium, and it is provided that if the dwelling house should be converted to any other use, and an additional agreed premium should not be paid, the risk shall cease. In that case, also, could there be any inquiry as to the causes or reasons why the additional premium was not paid? I imagine not. Take this case: Insurance of ship for one year to, at, and from all ports and places on the face of the globe, provided that if within the hurricane latitudes between August and November, the risk shall cease. This was formerly a well-known form of policy. Certainly

the causes which led to the presence of the ship within the prohibited time and place could not be inquired into to endanger the described risk. This clause in the policy which has been so much considered is not a clause of forfeiture; it is a clause showing when this policy expires by its own limitation, and that is the whole of its effect. You may adduce the common-law doctrine concerning conditions, and the bearing of the common law concerning excuses, but it was for no such purpose that the language was inserted, and it would be going aside from the objects which the parties had in view if the court were to do so.

I respectfully submit that any course of reason by which the insurance is held to continue after the happening of that event which the policy has said should terminate the risk, would be not to apply the laws of conditions to this contract, but to make a new one. It would be to apply this premium to the payment of a different risk from that which the assured undertook, and is sufficiently and plainly described, and I know of no warrant in the law of insurance, either marine, fire, or any other, which would justify the court in making such an application of the rules of the common law concerning conditions, or excuses for their non-performance. It is not to restore to the assured the benefit of an existing contract. It imposes on the insurer a new risk. He said if any one of these premiums, at the end of any one year, fails to be paid, the risk is determined. That is consented to by the assured when he receives the contract. He asks for no modification of it. The insurer has consented to no modification of it, and therefore when it is said here "this is a condition subsequent, and conditions subsequent rendered impossible by the law are to be stricken out and considered as if they were not inserted at all," this can have no application, so far as I understand, to this clause of the contract of insurance. Moreover, upon this particular case, and upon the facts of this particular case, the court can see how extraordinary the effects would be of disregarding this language as a description of the risk, and treating it as as condition the non-performance of which might be excused.

Bond, the insured in this case, tendered the premium to the agent in October. He died the following year, I think in August. When this claim was made by his representatives, and the premium tendered in pursuance of the claim, and, as they allege, in the performance of the obligation created by the policy, what was that premium tendered for? The premium was originally fixed and described as compensation for the risk in the policy; but when it was tendered, it was tendered in order to acquire the right to an already existing loss. The loss had taken place, and it was no longer a case where it was possible for the company to receive premiums for risks. It was a case where, if they received a premium, they did not receive it for a risk, but they received it for a loss.

If you disregard these words as descriptive of the risk run, and as necessarily limiting that risk, you carry it over indefinitely, as the circumstances may be; for wars may be long or short, people may die at one period or another of the war, or they may survive the war, and finally it terminates in the election of the representatives of the deceased insured to tender a sum of money and receive the amount insured. If the insured survives the war, his health being good, and his circumstances being such that he does not desire to continue the insurance, he is under no obligation to do so. In very many cases he would not. At all events he has the power to refuse. The representatives of *all who die during the war* will tender what was originally fixed upon as the premiun for risk, provided it should be duly paid when payable, as a condition for recovering the loss which has already accrued.

This wholly changes the condition of the parties. It is to recover and extend the contract, and apply it to a new state of things in which, as was said by a learned judge who sits on this bench, "that is not a case for taking a risk on the life of a man: it is a case where the company is required to pay for a death that has already occurred." (Hunt, J., in Howell *v.* Knickerbocker Life Ins. Co., 44 N. Y. Rep.) Why should any such construction be given to this language? In case of the failure to pay the premium,

the liability of the company must cease. In whose favor is it created? In favor of enemies. Against whom? Against loyal citizens. And, therefore, what is contended for in this case is that, contrary to the express language of the policy, which may reasonably and properly be treated as defining the risk contrary to that express language, enemies, although they do not pay, are to remain insured. As to them the risk has not ceased; and so long as the war continues, that benefit is also to continue; and at the end of the war, if they are living, they will themselves elect whether they will reinstate themselves in their former condition on the policy by tendering the premium, if they find it for their interest to do so, or will cease to be connected with the company if they find that for their interest.

I desire to draw the attention of the court to the inquiry as to what is supposed to be suspended.

The allegation on the other side is that the war did not abrogate this contract—that the war operated to suspend something. Well, what? If it operated to suspend the policy, the contract was not in operation when he died. (Wall *v.* Ins. Co., 36 N. Y. R., 157; Williams *v.* Albany City Ins. Co., 2 American R., 95.) He died before the close of the war. That is not what they mean. The whole drift of the argument shows they do not mean the policy was suspended. They mean that this clause in the policy, inserted for the purpose of limiting and defining the risk—that was suspended. Well, where, in any decision made on the subject of the laws of war, will you find any precedent on any principle which will go to this extent—that a contract is not suspended *that remains in force*, but *some particular stipulation* in the contract is *suspended* by reason of the war; and while the enemy is *excused* from the performance of the particular stipulation, the loyal citizen is bound by the *contract?*

I wish your honors would also consider the nature of this company: what it must do in order to conform to the law of its existence, and how it could do it if this rule is to be administered.

This is a mutual company which, like other corpora-

tions, represents its members. Every person insured is a member of the company; and as such he is entitled under certain rules to participate in its profits. These rules are prescribed by the charter, and it must be understood and agreed on all hands that every person who takes a policy in this company, and thereby becomes a member of it, understands and agrees that its business is to be transacted, and all its business is to be transacted, in conformity with the charter.

This charter prescribes that, in the first month of each year after the organization of the company, an account shall be taken of the members, and of the sums respectively paid out by them as premiums; all the gains from these premiums, always paid in advance, and from their investment relied upon as the sole capital of the company on one side, and on the other side the losses and expenses of the company. That account is to be taken annually; and then there is to be a distribution among the then members of the company on the footing of that account. It is very apparent, and cannot have escaped the observation of your honors, that it is utterly impossible for the company to comply with these provisions of their charter, provided the company does not know, and has not the means of knowing at the time when the account is to be taken, who its members are.

Again, it is equally impossible for the company to know who its members are, and, therefore, to take the account in compliance with the charter, if enemies are included within their numbers, and if those enemies are to be treated as if they had paid their annual premiums when they have not, and if these enemies are to be treated in all cases as continuing members of the company, although they have not entitled themselves so to be treated by what they have done.

I respectfully rely upon this inability of the company to carry out this fundamental provision of the charter, provided the interpretation which is now insisted upon should be decided to be the true interpretation of the language I have been commenting upon. On the other hand, if the

view I have submitted as descriptive of the condition of the risk is correct, there is not the slightest difficulty. The company takes the account as required by the charter. The premium due from an enemy has not been paid. The time has expired; it has not been paid; and that is sufficient. He is no longer a member. It is immaterial whether he was an enemy or a loyal citizen. He has not paid his premium. He is no longer a member, and is not to enter into this account; and there is no other mode in which the charter can be complied with except to treat those who are enemies and do not pay their premiums exactly as they treat those who are friends and do not pay their premiums.

Neither does there seem to me to be any difficulty in bringing this contract within these rules of public law, which declare a contract to be abrogated by war.

It is true that all executory contracts are not abrogated by war. A single bond to pay a sum of money *in futuro* is not abrogated by war. It requires no intercourse between the obligor and obligee. It is a complete contract in itself. When war breaks out nothing is necessary except to say this is suspended just where the war found it, to be revived again when peace is declared. But I apprehend the true rule between that class of executory contracts and others is this: that if the executory contract is of such a nature as to require intercourse between the parties, in order to keep it on foot, in order to renew and revivify that contract, in that case war abrogates the contract.

That, I think, is the result arrived at by Mr. Duer, after a very full and able examination of all the authorities upon this subject. He says, in substance and effect, at the place cited on our brief, that if there is a vested right to a sum of money or other thing at the breaking out of war, and it is needful to hold no intercourse and do no act in order to keep it on foot, it is not abrogated; but if the contract is of such a character that acts must be done by one party to the other, and intercourse must be held in order either to keep the contract in existence or to renew it, in such case war abrogates the contract. Here, manifestly, the con-

tract is of the latter character. The only case we have met with which comes very close to the determination of the peculiar character of this contract, arising out of these required payments from time to time and from year to year, is the case in 12 East.

That was a case of a life policy, or rather an annuity, which amounted to the same thing. There the premiums were payable quarterly. Lord Ellenborough, in delivering the opinion of the king's bench, says expressly, and he repeats it in different forms: "This is in substance a contract to insure quarterly, and every time the insured elects to pay a premium, at the end of a quarter, he elects to enter into a new contract, because he was under no obligation to pay the premium, and the other party was under no obligation to pay the loss unless the premium was paid; therefore, when he comes in with his election, and offers the premium, and the other party accepts it, their minds have met on this new subject of the insurance for that following quarter, and it is as much a new and additional contract as it was in its inception."

That being so, of course, this contract, that at the end of each year this insured should make his election, that he should do that act that was needful in order to carry the contract over from the past year to the following year, this was in substance and effect to make a new contract. It is true he had the privilege conferred upon him and the right by the policy to do so. That changed what would otherwise have been his duty and their practice, to require a medical examination at the end of each year. They had a medical examination made at the inception of the policy. They have not required any in renewal. They said, "we will take our risk of conferring upon you as long as you live this privilege of renewing or extending the contract from year to year;" and when the party using that privilege comes forward and does that which makes a binding contract where no binding contract for the following year existed before, why that is a new contract. It covers a different risk, a risk for 1862 instead of the risk which he had previously paid for during 1861. The risk for 1862

may be a very different thing from the risk in 1861. It is necessarily a different subject. It may be in its consequences and its liabilities very different from the preceding risk.

These observations, as your honors will perceive, relate to the effect of the war upon this contract, on the account of its being an executory contract, requiring this further action of the insured, and the further consent, I may add, of the insurer. It is open to the insurer at any time when this additional premium is tendered to say, I will look to the conditions of this policy; you have been out of the geographical limits which are prescribed; you have entered the military service; you have broken some one of these conditions, which are called express conditions in the policy, and we will not receive your premium. We do not give our consent to its reception. If, however, they silently receive it because they had given their consent, and thus the two minds meet: the mind of the assured, who, actuated to offer this premium in advance for the new risk to be taken by the company for the following year, and the mind of the insurer, who consents to it, not taking any objection on account of the conditions.

There is only one other general subject, as to which I wish to say a few words, and that is whether a continuing guaranty given by one belligerent to another, even where war intervened, will still exist; whether it does not come under that principle which is everywhere mentioned and relied upon in discussing questions like this, that it is unlawful to enter into any contract with a belligerent, which has a necessary tendency to increase the resources of that other belligerent's country, or which has a necessary tendency to alienate the good will of one belligerent from his countrymen, and to interfere with the prosecution of the war.

There is a case in the 35th N. J. R. not known to Judge Emmons when he delivered his opinion, concerning which I wish to say a few words, because it seems to me to bring quite prominently the defects in the argument of the policy holders upon which I have relied.

The grounds of that decision, as I understand them, were these: That the war, (for he takes high and manly ground on that subject,) that the war made the payment of these premiums unlawful. He does not advert to what my colleague has pressed upon your attention, that the loyal subjects of the United States may not have been bound to remain within the enemy's lines. That there cannot be predicated of this subject an impossibility to pay those premiums, especially until your honors can know and become perfectly satisfied of that impossibility, which does not appear upon the face of things to have been impossible. The learned judge does not advert to that, but he assumes that the war rendered the payment of the premiums impossible—that this must be considered an act of law; that the payment of the premium was a condition subsequent, and that the common law excuses non-performance of conditions subsequent, when that performance was forbidden by law. These are the grounds, as I understand them, on which that case was decided.

Your honors will perceive, in the first place, that this disregards altogether what I conceive to have been the purpose of inserting this language—to describe the limit and duration of the risk, and treats it as a simple common-law condition. It overlooks the fact that this is a policy of insurance; that it is absolutely necessary in that policy to define the duration of the risk; that these words have a sensible and direct application to that subject, and that was their apparent office; and it proceeds to treat it simply as a common-law condition.

May it please your honors, if it were to be treated as a common-law condition, is it a condition precedent or a condition subsequent? If you take the view of the contract which was taken by the king's bench, in 12 East—which I have stated here to be what I desire to draw the attention of the court to—that it is an agreement to insure for each year which shall elapse after the payment of the last premium—if that is the view you take of that clause, there seems to be a perfect condition precedent, and no

condition subsequent respecting the payment of the premiums.

In the next place, he cites no authorities to show—and I respectfully submit no authorities can be found to show—that as between belligerents an executory contract requiring the performance of a common-law condition, even subsequent, is to be kept open for the benefit and advantage of one belligerent, to the injury of our own citizens, by applying the common-law doctrines of excuse for their performance of conditions subsequent.

But where is the application of that doctrine to a case between belligerents, when the contract, at the breaking out of the war, was an executory contract, requiring acts to be done, subsequent or precedent, I care not which, between these parties.

I submit that if this case in the 35th N. J. had been subjected to the criticism of the learned judge delivering the opinion below in this case, he would have found very little difficulty in disposing of it upon grounds which he conceives to be solid.

I understood inquiry was made yesterday of one of the counsel, by one of the court, whether he contended that where time was of the essence of a contract—manifestly whatever else may be said here, time is of the essence of this contract—if he contended that relief could be had because it was impossible to perform, whatever source the impossibility might arise from, except the act of the promisee himself. As in the case which my brother Phillips has referred to (in Peters R.,) where the party himself prevented performance, of course he could not take advantage of his own wrong, and therefore he could not set up the condition. But with that exception, is there any case in which it has been held that where time is of the essence of the contract non-performance can be excused, and all the benefits be realized by the party who agreed to perform, just as if he had performed? The authorities on this subject are collected by Judge Emmons with great care, and arranged with much skill in his opinion. I could add no-

thing to what he has said; but I wish to make a single remark, first, to show that time is necessarily of the essence of this contract, and secondly, to show that the authority in 16 Wall. has no application.

Time is of the essence of this contract, whether it be looked upon in the light of a condition or of the limitation of the risk. The charter of this company looks solely to the payment in advance for the means to meet losses and pay the expenses of the company; and consequently all the provisions of this charter concerning the taking of these accounts, and the persons who are to be credited in these accounts, they all assume that the premiums are to be paid in advance, and, of course, if paid in advance, to be paid on the days stipulated; and there being nothing on the face of this policy to control the idea that time is of the essence of this contract, but, on the contrary, the terms of the contract being strongly the other way, the whole constitutional organization and mode of action of the company depending upon this being so treated, I suppose the court will so treat it; and if it does, I know of no case in which the court has undertaken to treat time as not a necessary element in a contract.

The case of Davis and Gray I had something to do with in the way of argument, and in that case the court decided that the railroad company was relieved, in point of time, from a strict performance; but it was merely a repetition of the case in Peters cited by Brother Phillips. The State of Texas was one party to this contract and the railroad corporation was the other party. The State of Texas had undertaken to secede from the United States, and had instituted and was carrying on civil war, and it was this war that prevented the performance by the railroad company within the time they had agreed upon. It was a plain case of a dispensation of performance within the specified time by the act of the party, and the only party who had the right to require a strict performance.

No. 217.

SUPREME COURT OF THE UNITED STATES.

THE N. Y. LIFE INSURANCE COMPANY, APPELLANT,

vs.

WILLIAM C. STATHAM AND PARMELIA A. DUDLEY, FORMERLY PARMELIA A. STATHAM.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Argument of W. L. MURRAY and CLINTON RICE, for Appellees.

SUPREME COURT OF THE UNITED STATES.

THE N. Y. LIFE INSURANCE COMPANY, APPELLANT,

vs.

WILLIAM C. STATHAM AND PARMELIA A. DUDLEY, FORMERLY PARMELIA A. STATHAM.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Argument of W. L. NUGENT and CLINTON RICE, for Appellees.

This was a bill in equity for relief, against the forfeiture of an Insurance Policy, because of the non-payment of a premium due on the eighth day of December, 1861; and this fact is very important to be considered in reaching a proper conclusion. On the eighth day of December, 1857, Mrs. Lucy B. Statham effected Insurance in the New York Life Insurance Company, upon the life of her husband, Dr. Augustine Davis Statham, through A. S. Brown, the agent of the Company at Grenada, Mississippi, paying therefor a premium of two hundred and eight (50-100) dollars, and agreeing to pay a like sum annually during the life of the assured. The stipulation in the policy upon which the appellant relies to defeat a recovery, is this: "* * * In case the said Mrs. Lucy B. Statham shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then * * * the said Company shall not be liable to the

payment of the sum insured, or any part thereof; and this policy shall cease and determine." P. R., 6.

It is admitted by the pleadings, and shown by the proof, that the annual premiums due on the policy were regularly and promptly paid to Mr. Brown, the said agent, up to and including the eighth day of December, 1860, and that the premium due December 8, 1861, was duly tendered to said agent. In other words, on a policy of $5,000, Mrs. Statham has paid to the Company premiums amounting to $2,080 50, exclusive of interest, which sum, with ordinary prudence in investing, would yield an amount annually more than equal to the premium called for. If there be any divisible surplus accumulated during the life of the policy, as there assuredly must have been, the the process of exclusive absorption and appropriation by the Company cannot be justified upon any principles of equity or morals. It is true the appellant is an Insurance Company domiciled in New York, but that can furnish no reason for excluding the appellees from the benefit secured by the payment of the premiums on the policy for so long a time. The idea of a Mutual Insurance Company, as far as the public is concerned, is a myth. Who, among the many thousand policy-holders outside the city of New York, ever hears of a meeting of the members of this Insurance Company for the election of officers? Who ever has the opportunity of casting a vote, or examining the records it keeps? Who has ever gotten into the mysteries of its workings, or obtained information as to anything he may think of interest to him? With the regularity of clock work, the renewal receipts are forwarded for collection, and paid, until the hapless victim dies,—and then a law suit.

This suit was commenced in the Chancery Court of Hinds county, Mississippi, and the grounds for a recovery are these: At the time the Insurance was effected, Mrs. Statham and her husband were citizens of Mississippi, resident in Grenada; the former died in 1856, and the latter on the twentieth day of July, 1862. A. S. Brown was constituted and appointed agent of the Company, at Grenada, on the twenty-sixth day of December, 1859, and was such agent on the eighth day of December, 1851, when the policy was issued to Mrs. Statham. His appointment was *never revoked, in fact;* up to the eighth of December, 1861, the premiums on the policy had been regularly paid to him, and that *then* due, was tendered to him and not received, because he was not put in possession of the renewal receipts; *at the time the policy was applied for and issued, the agent informed Dr. Statham that the premium payments on the policy were to be made to him in the town of Grenada;* neither Dr. Statham nor A. S. Brown ever engaged in any mil-

itary service against the United States. P. R., 14, 15, 16, 17, 27.

Aside from this, it is insisted that, in consequence of the existence of the civil war, it became unlawful for Mrs. Statham to p[illegible] and the Company to receive the premium due in December, 186[illegible] Statham made every effort to pay the premium then due, because of the refusal on the part of Brown, agent, to rec[illegible] that it was legally and practically impossible to pay it othe[illegible] only defense is, the legal forfeiture growing out of the non[illegible] fact.

611

On this record, we insist that the case is wholly adju[illegible] that there is no question made in the pleadings which will warrant this Court in reversing the decision of the Supreme Court of Mississippi. The bill was demurred to in the Chancery Court of Hinds county, and the demurrer was sustained; but that decree, on appeal, was reversed, the Supreme Court holding that the complainants were entitled to relief. The question was, do the allegations of the bill suffice to relieve against the consequences of an actual non-payment of the premium on the eighth day of December, 1861, and it was decided in the affirmative. There is no question involved which justifies the invocation of any exclusive jurisdiction here, or which could possibly necessitate or warrant a reversal of the decision of the Court of last resort in Mississippi. It is scarcely consistent with right that the appellant, after submitting to the jurisdiction of the State courts up to the time of an adjudication conclusively adverse, should, by a mere change in the forum of litigation, have that decision reviewed. If this Court now entertain jurisdiction in this cause, it must draw to it every case of like character, whether a final decree has been passed or not. In Mays vs. Fritton, 20 Wall., 418, this Court say: "It is not competent to a party to assent to a proceeding in the Court below, take his chance of success, and, upon failure, come here and object that the Court below had no authority to take the proceeding." And the cases cited by the Court fully sustain the principle for which we now contend. We may say, that it is a fundamental principle in jurisprudence.

What, however, is the nature of the contract between the parties? Is it executory or executed? It is a simple contract. For the consideration of $208 50, and the annual payment of the same sum during Dr. Statham's life, the Company agreed to pay Mrs. Statham, at his death, $5,000. That is the whole bargain, subject to the conditions annexed. Let us analyze it. When the first premium was paid, there can be no doubt that the contract was fully executed. Nothing remained to be done by either party; and if, prior to the maturity of the second premium, Dr. Statham had died, the policy would have

payment of the sum insured, or any part thereof; and this policy shall cease and determine." P. R., 6.

It is admitted by the pleadings, and shown by the proof, that the annual premiums due on the policy were regularly and promptly paid to Mr. Brown, the said agent, up to and including the eighth day of December, 1860, and that the premium due December 8, 1861, was duly tendered to said agent. In other words, on a policy of $5,000, Mrs. Statham has paid to the Company premiums amounting to $2,080 50, exclusive of interest, which sum, with ordinary prudence in investing, would yield an amount annually more than equal to the premium called for. If there be any divisible surplus accumulated during the life of the policy, as there assuredly must have been, the the process of exclusive absorption and appropriation by the Company cannot be justified upon any principles of equity or morals. It is true the appellant is an Insurance Company domiciled in New York, but that can furnish no reason for excluding the appellees from the benefit secured by the payment of the premiums on the policy for so long a time. The idea of a Mutual Insurance Company, as far as the public is concerned, is a myth. Who, among the many thousand policy-holders outside the city of New York, ever hears of a meeting of the members of this Insurance Company for the election of officers? Who ever has the opportunity of casting a vote, or examining the records it keeps? Who has ever gotten into the mysteries of its workings, or obtained information as to anything he may think of interest to him? With the regularity of clock work, the renewal receipts are forwarded for collection, and paid, until the hapless victim dies,—and then a law suit.

This suit was commenced in the Chancery Court of Hinds county, Mississippi, and the grounds for a recovery are these: At the time the Insurance was effected, Mrs. Statham and her husband were citizens of Mississippi, resident in Grenada; the former died in 1856, and the latter on the twentieth day of July, 1862. A. S. Brown was constituted and appointed agent of the Company, at Grenada, on the twenty-sixth day of December, 1859, and was such agent on the eighth day of December, 1857, when the policy was issued to Mrs. Statham. His appointment was *never revoked, in fact;* up to the eighth of December, 1861, the premiums on the policy had been regularly paid to him, and that *then* due, was tendered to him and not received, because he was not put in possession of the renewal receipts; *at the time the policy was applied for and issued, the agent informed Dr. Statham that the premium payments on the policy were to be made to him in the town of Grenada;* neither Dr. Statham nor A. S. Brown ever engaged in any mil-

itary service against the United States. P. R., 14, 15, 16, 17, 27.

Aside from this, it is insisted that, in consequence of the existence of the civil war, it became unlawful for Mrs. Statham to pay, and the Company to receive the premium due in December, 1861; that Dr. Statham made every effort to pay the premium then due, and failed, because of the refusal on the part of Brown, agent, to receive it; and that it was legally and practically impossible to pay it otherwise. The only defense is, the legal forfeiture growing out of the non-payment, in fact.

On this record, we insist that the case is wholly adjudicated, and that there is no question made in the pleadings which will warrant this Court in reversing the decision of the Supreme Court of Mississippi. The bill was demurred to in the Chancery Court of Hinds county, and the demurrer was sustained; but that decree, on appeal, was reversed, the Supreme Court holding that the complainants were entitled to relief. The question was, do the allegations of the bill suffice to relieve against the consequences of an actual non-payment of the premium on the eighth day of December, 1861, and it was decided in the affirmative. There is no question involved which justifies the invocation of any exclusive jurisdiction here, or which could possibly necessitate or warrant a reversal of the decision of the Court of last resort in Mississippi. It is scarcely consistent with right that the appellant, after submitting to the jurisdiction of the State courts up to the time of an adjudication conclusively adverse, should, by a mere change in the forum of litigation, have that decision reviewed. If this Court now ertain jurisdiction in this cause, it must draw to it every case of like character, whether a final decree has been passed or not. In Mays vs. Fritton, 20 Wall., 418, this Court say: "It is not competent to a party to assent to a proceeding in the Court below, take his chance of success, and, upon failure, come here and object that the Court below had no authority to take the proceeding." And the cases cited by the Court fully sustain the principle for which we now contend. We may say, that it is a fundamental principle in jurisprudence.

What, however, is the nature of the contract between the parties? Is it executory or executed? It is a simple contract. For the consideration of $208 50, and the annual payment of the same sum during Dr. Statham's life, the Company agreed to pay Mrs. Statham, at his death, $5,000. That is the whole bargain, subject to the conditions annexed. Let us analyze it. When the first premium was paid, there can be no doubt that the contract was fully executed. Nothing remained to be done by either party; and if, prior to the maturity of the second premium, Dr. Statham had died, the policy would have

been paid, or could have been collected in full Nor was the character thus impressed upon the contract ever changed by any act or omission of Dr. Statham, or his wife. It certainly would not be urged that, if the assured had died at any time prior to the eighth day of December, 18[illegible] the right to a recovery would have been lost; for, under any construction of the contract, it was executed, and there was no constitution or law which could render it void. If the agreement, then, could ever become *executory*, it must be because of some provision embodied in its text; but there is nothing of the sort here. Besides, there can be no such thing as a contract *executed* and *executory* at the same time; there must be a time when it is one or the other, and that is the period of its execution. When the first premium was paid, and the application for insurance forwarded, there was indeed an *executory* contract to insure, but this became *executed* the moment the application was *approved* by the Company and the policy forwarded for delivery. To say that the policy was in anywise different, would be to say that it has no fixed, definite character, but is constantly in a transition state; traveling from *executory* to *executed*, and never either. It is executed when the premium is paid; thereafter it commences to change and has no particular character up to the day the next premium falls due. If that is paid, all doubt is removed; if not paid, the executory contract fails. Manifestly such a construction is not warranted. If we take the other view, the whole matter is plain. The policy was an *executed* contract, liable to be defeated by the non-performance of the stipulated condition as to payment of the premiums. To provide against delinquencies, the condition was inserted in the policy. The liability of the Company was at an end, and the policy was to cease and determine in the contingency stated; it was a contract upon a condition subsequent, and could be nothing else. Suppose the premium due in December, 1861, had been tendered to the Company's officers in New York, and *refused*, would the remedy on the policy have failed? If not, the *fact* of actual non-payment would be apparent; and if such payment were a condition *precedent* to a continuing vitality, life did not exist in fact. So that, if the argument advanced in favor of the appellant be practically applied, the Insurance Company, by the mere refusal to accept the premium tendered, could terminate the contract against the will and consent of the other party. The reason for affording relief in the one case, is no greater than that which is now urged in the other, and the jurisdiction of a Court of Equity can be as successfully invoked.

There is another very important circumstance connected with this case. At the time the application was made and the policy issued, the

agent informed Dr. Statham that the premiums were to be paid to him in Grenada, and they were so paid and received for nearly ten years. This agreement formed a material and necessary part of the contract of assurance. During the whole time stated, the renewal receipts were forwarded to Brown for delivery, and the mode of payment originally agreed upon was faithfully recognized and acted on by the appellant. Now, it may be granted, for argument's sake, that no agent of the Company has any authority to receive a premium unless he has in his possession the formal renewal receipt, but the *duty to provide seasonably* such receipts necessarily devolved upon the Company; and if the agent were unable to receive the premium because of the negligence of his principal, this could furnish no good reason why the failure should be visited upon the policy-holder, a tender of the premium having been made according to the exigency of the contract. If any other view were taken, the Company could terminate any risk it pleased by simply withholding from its accredited agent the formal renewal receipt at the time of the maturity of the premium, and the assured would have no recourse whatever. And, indeed, here the simple *fact of non payment* is urged as an unanswerable argument, regardless of the reasons leading to the failure. It may be true that the premium was payable in New York by the By-Laws of the Company, but the policy did not call for it, and the understanding of the parties at the time of its issuance was altogether different. To transact any busines outside the corporate limits of New York, resort must be had to agencies, and no one would insure if it were required to remit the annual premiums to a distant city through the mails, and trust to the officials at the home office to forward the renewal receipts. Even then the payment might become nugatory, unless the officers chose to recognize it. There is no magic in this renewal receipt, *eo nomine*. The *payment of the premium* is all that is *necessary*, and the authority of the agent cannot be limited by any stipulation of the kind suggested. The argument is this: you are my agent, and have authority to deliver policies upon the agreement and understanding that the annual premiums are to be paid to you by the assured at his domicile; but I make your authority to receive dependent upon my giving a form for receipt, conjured up by my own ingenuity, thereby engrafting a condition upon the contract unknown to the assured, and I reserve to myself the right to defeat the contract by withholding the renewal receipt at the very time it is needed. The appellant undoubtedly had the right to employ the agent in the first instance; and that this agency might be profitable, to authorize the making of just the contract entered into in this case; and if the representations of Brown were

not expressly authorized, the Company, having acted upon them for so long a time, cannot be heard to dispute them. It needs no citation of authority to show that they are estopped to deny their validity. A necessary part of Brown's agency was to receive the premiums on his policy for the Company, and to deliver the renewal receipt contemporaneously. There is nothing in the suggestion that his authority to receive the premiums was derived in each specific instance, and in the form of a receipt signed by the President or Secretary. For, if that be so, there was no present obligation on the Company, so far as the policy shows, to furnish the proper evidence of payment; and it could refuse or not, as the varying inclinations of the controlling officials might suggest. Besides this, the simple withholding of the renewal receipt without notice, could be made the means of defeating the most diligent; and that, too, after a series of years had justified the expectation of a different course. It would be difficult to give to the simple receipt the potency contended for. As a mere regulation of the Company to secure exactness in accounts, and regularity in dealings, with proper checks against agents, it is eminently wise and prudential; but beyond this, it could not be carried. It is safe because it furnishes the assured *conclusive evidence on its face* of the authority to secure the premium due.

When the policy was issued to Dr. Statham, the Company had a *general agent* at Grenada, regularly appointed, and his agency was not limited as to duration. He was selected and designated as agent. He was to be furnished, and was furnished, with blank forms of application, &c. The scope of his agency was, to receive and forward applications for insurance; to deliver policies, and receive the annual premiums. It could not have been less. He had a moneyed interest in each premium paid. When once a policy passed through his hands to the assured, he was necessarily empowered to receive the successive premiums, not as upon a new contract annually made, and annually renewed, but as upon an existing contract, and as an incident to his office—a part of his duty created by the issuance of the policy upon an application forwarded by him. The appellant in this case, by the very terms of the contract, and the collateral agreement, was bound to have an agent provided with renewal receipts, and authorized to receive and receipt for the premiums. This they did have, in the person of Brown, and the tender to him of the premiums in 1861 was, therefore, a tender to the Company, and excuses or avoids the breach now insisted on. The existence of the war may have operated to suspend the performances of this duty, or to prevent it; but the duty of payment, being dependent upon the presence of an accredited agent,

authorized to receive the premium, was necessarily suspe
with it.

The stipulation in question was not intended to define
of the risk. The policy shows that to have been for the
natural life of Dr. Statham, commencing on the eighth d
ber, 185[illegible], subject to the condition annexed to the policy. This was a condition subsequent, and the facts embodied in the record fully warrant the intervention of a Court of Equity. So the Supreme Court of Mississippi supposed, and in an able, exhaustive and unanswerable opinion, demonstrated. We invite this Court to an examination of that opinion, and upon it rest our claim to an affirmance of the decree rendered by the Circuit Court. Statham vs. New York Life Insurance Company, 45 Miss., 592. We also refer to the annexed agreement, which constitutes part of the record in the case.

W. L. NUGENT,
CLINTON RICE,
Solicitors of Appellees.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF MISSISSIPPI. IN EQUITY.

WILLIAM C. STATHAM, *et al.*,
179, *vs.* N. S.,
THE N. Y. LIFE INS. CO., *et al.*

The complainant having exhibited Ints. for the purpose of cross-examining Morris Franklin, President of said Company, as follows:

1. When you say, in your deposition, that A. S. Brown was not, on the eighth day of December, 1861, in possession of any receipt for the premium on Dr. Statham's life policy, then due, signed by either the President, or actuary of the Company, you mean, I suppose, that so far as your knowledge extended, he was not?

2. When you state, in your deposition, that said Brown ceased to be an agent of said Company on the sixteenth day of August, 1861, and thereafter had no authority given him to act, in any respect, for the Company, do you so state that as a matter of opinion, and not as a matter of fact?

3. Did said Company ever make a formal revocation of Mr. Brown's agency?

To save the delay and expense of taking said deposition, it was agreed between counsel for complainants and defendants, that the answers to said questions would be identical with the answers to simila

not expressly authorized, the Company, having acted upon them for so long a time, cannot be heard to dispute them. It needs no citation of authority to show that they are estopped to deny their validity. A necessary part of Brown's agency was to receive the premiums on his policy for the Company, and to deliver the renewal receipt contemporaneously. There is nothing in the suggestion that his authority to receive the premiums was derived in each specific instance, and in the form of a receipt signed by the President or Secretary. For, if that be so, there was no present obligation on the Company, so far as the policy shows, to furnish the proper evidence of payment; and it could refuse or not, as the varying inclinations of the controlling officials might suggest. Besides this, the simple withholding of the renewal receipt without notice, could be made the means of defeating the most diligent; and that, too, after a series of years had justified the expectation of a different course. It would be difficult to give to the simple receipt the potency contended for. As a mere regulation of the Company to secure exactness in accounts, and regularity in dealings, with proper checks against agents, it is eminently wise and prudential; but beyond this, it could not be carried. It is safe because it furnishes the assured *conclusive evidence on its face* of the authority to secure the premium due.

When the policy was issued to Dr. Statham, the Company had a *general agent* at Grenada, regularly appointed, and his agency was not limited as to duration. He was selected and designated as agent. He was to be furnished, and was furnished, with blank forms of application, &c. The scope of his agency was, to receive and forward applications for insurance; to deliver policies, and receive the annual premiums. It could not have been less. He had a moneyed interest in each premium paid. When once a policy passed through his hands to the assured, he was necessarily empowered to receive the successive premiums, not as upon a new contract annually made, and annually renewed, but as upon an existing contract, and as an incident to his office—a part of his duty created by the issuance of the policy upon an application forwarded by him. The appellant in this case, by the very terms of the contract, and the collateral agreement, was bound to have an agent provided with renewal receipts, and authorized to receive and receipt for the premiums. This they did have, in the person of Brown, and the tender to him of the premiums in 1861 was, therefore, a tender to the Company, and excuses or avoids the breach now insisted on. The existence of the war may have operated to suspend the performances of this duty, or to prevent it; but the duty of payment, being dependent upon the presence of an accredited agent,

authorized to receive the premium, was necessarily suspended along with it.

The stipulation in question was not intended to define the duration of the risk. The policy shows that to have been for the term of the natural life of Dr. Statham, commencing on the eighth day of December, 185[illegible], subject to the condition annexed to the policy. This was a condition subsequent, and the facts embodied in the record fully warrant the intervention of a Court of Equity. So the Supreme Court of Mississippi supposed, and in an able, exhaustive and unanswerable opinion, demonstrated. We invite this Court to an examination of that opinion, and upon it rest our claim to an affirmance of the decree rendered by the Circuit Court. Statham vs. New York Life Insurance Company, 45 Miss., 592. We also refer to the annexed agreement, which constitutes part of the record in the case.

W. L. NUGENT,
CLINTON RICE,
Solicitors of Appellees.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF MISSISSIPPI. IN EQUITY.

WILLIAM C. STATHAM, *et al.*,
179, *vs.* N. S.,
THE N. Y. LIFE INS. CO., *et al.*

The complainant having exhibited Ints. for the purpose of cross-examining Morris Franklin, President of said Company, as follows:

1. When you say, in your deposition, that A. S. Brown was not, on the eighth day of December, 1861, in possession of any receipt for the premium on Dr. Statham's life policy, then due, signed by either the President, or actuary of the Company, you mean, I suppose, that so far as your knowledge extended, he was not?

2. When you state, in your deposition, that said Brown ceased to be an agent of said Company on the sixteenth day of August, 1861, and thereafter had no authority given him to act, in any respect, for the Company, do you so state that as a matter of opinion, and not as a matter of fact?

3. Did said Company ever make a formal revocation of Mr. Brown's agency?

To save the delay and expense of taking said deposition, it was agreed between counsel for complainants and defendants, that the answers to said questions would be identical with the answers to simila

(218)

questions propounded to the witness in the case of Charlotte Seyms vs. The New York Life Insurance Company, now pending in the Supreme Court of the United States, under No. 463; and that the Court, at the hearing, should so consider. It was also, in open Court, at hearing before the Circuit Court of the United States, for said Southern District of Mississippi, agreed that such answers would have been given to said questions, and that the Court should so consider. This agreement is now reduced to writing, and signed by the parties, so that the matter aforesaid may be considered by said Court as if said agreement had been signed and incorporated in the record.

W. L. NUGENT,
Solicitor for Complainant.

T. J. & F. A. R. WHARTON,
Atts. for N. Y. Life Ins. Co.

No. 217

Additional Brief for Appellees

In the Supreme Court of the United States,

HELD AT WASHINGTON, D. C.

THE NEW YORK LIFE INSURANCE COMPANY, *Appellant.*

versus

WILLIAM C. STATHAM AND PARMILIA A. & DUDLEY, FORMERLY STATHAM,

~~*Respondents.*~~ Appellees

N. C. SNIDER AND
JAS. F. MISTER,
Solicitors for Appellees.

Hansell & Keen, print, 74 Common st.

Clinton Rice,
of Counsel for Appellees
Wash. D. C.

In the Supreme Court of the United States.

No. 217

additional brief for Appellees,

In the Supreme Court of the United States,

HELD AT WASHINGTON, D. C.

THE NEW YORK LIFE INSURANCE COMPANY, *Appellant.*

versus

WILLIAM C. STATHAM AND PARMLIA A. DUDLEY, FORMERLY STATHAM,

~~*Respondents.*~~ appellees

Appeal from the Circuit Court, of the United States for the Southern District of Mississippi.

This was an attachment in chancery (under the Mississippi statute) for relief against the forfeiture of an insurance policy for non payment of premium falling due during the late civil war (December 8, 1861); and to reach assets belonging to a non-resident debtor in the hands of a resident defendant.

The facts of the case are substantially as follows: On the 8th December, 1851, the New York Life

Insurance Company insured the life of A. D. Statham,—policy issued in favor of and to be paid to his wife Lucy B., in case she survived her husband, if she did not, then to her children—for $5,000, upon consideration of the payment of an annual premium of $208 50. The premiums were regularly paid up to 8th December, 1861, and *on that day* the premium was duly tendered to Brown, who was the resident agent of the company at Grenada, Mississippi. Brown was agent when the policy was issued to Lucy B. Statham, and at the time of tender, unless his agency was revoked by existence of war, as it was not otherwise revoked. Statham and wife were citizens of Mississippi and resident in Grenada. She, Lucy B. Statham, died in 1856, and he, A. D. Statham, died 20 July, 1862. Complainants are the children and heirs of Lucy B. Statham.

Suit was originally brought by attachment in the Chancery Court of Hinds county, Mississippi, by respondents against appellant. The bill was demurred to on various grounds, which may be classed under two heads.

1. Complainants had an adequate remedy at law.

2. Complainants forfeited all right to the amount of the policy, by the non-payment of the premium due on 8th December, 1861, and the excuse set up is not sufficient to relieve against the forfeiture. Demurrer was sustained and bill dis-

missed. Writ of error to Supreme Court of Mississippi.

The Supreme Court of Mississippi reversed the decree of the chancellor, sustaining the demurrer and dismissing the bill—and rendered judgment, overruling the demurrer and remanding the cause.

Subsequently appellant (the New York Life Insurance Company.) removed the cause to the Circuit Court of the United States, which rendered judgment in favor of complainants.—Appeal to this Court.

Written stipulation (by attorneys) as to deposition on file.

The questions involved are :

1. Was the action properly brought, and is it maintained as to jurisdiction.
2. Was the contract abrogated or in any wise invalidated or affected by the war.
3. Was the agency revoked or suspended by the war.

On the first point there can be no reasonable doubt that the suit was properly brought and that jurisdiction was properly assumed and exercised.

The provisions of the statute (Revised Code of 1857, page 549, Art 602), are the same as those of the Act of June 7, 1822, which was construed by the Court of Mississippi, in case of Freeman vs.

Guion, et al., 11 Smedes & Marshall, page 58, and sustained and confirmed by the later case of McKay *vs*, Cobb & Manlove, 33 Miss. 533; and still later case of Scruggs et al. vs. Blain et al., 44 Mississippi, 406. It was there held "that the basis of the jurisdiction, is purely statutory, and depends on the condition of facts stated in the Statute, to wit: the absence of the debtor—the presence here of effects belonging to, or a debt due to him, or his owning lands or tenements in this State."

The allegations of the bill are in the terms of the Statute. The jurisdiction in a similar statute was maintained in Virginia, 3 Manf, 94; 7 Cranch, 202; 3 Leigh 300; 10 Ib. 507; 12 Ib. 406; 2 Rob. (Va.) 206. See also the brief of Judge Wm. Yerger, in this case, in the Supreme Court of Mississippi, reported in 45 Mississippi, 592.

On the second question, to wit: whether the contract was abrogated by the war—it is very clear that it was not, both on principle and by the decisions on the direct point.

"The war could have had no other effect than to suspend remedy upon it or performance of it; because of the interdict of all commerce and intercourse between the parties." Per Simrall, Justice, in Statham vs. New York Life Insurance Company, 45 Miss., 592.

Smith vs. Charter Oak Life Insurance Company. Circuit Court of St. Louis County, Missouri—reported in Central Law Journal, Vol. No. 7, p. 76.

Syms vs. New York Life Insurance Company (U. S. Circuit Court Southern District of Mississippi, Nov. term, 1873, cited in note Central Law Journal, Vol. 1, p. 76, above.)

Cohen vs. New York Mutual Llfe Insurance Company, 50 New York, 610.

Sands vs. New York Life Insurance Company, 50 New York, 626.

Manhattan Life Insurance Company vs. Warwick, 20 Gratt, (Va.) 614.

New York Life Insurance Company vs. Cloptom, 7 Bush, Ky., 179.

Hamilton vs. New York Mutual Life Insurance Company, 9 Blatch. 234.

Semmes vs. Hartford Insurance Company, 14 Wall, 158.

The opinion of Emmons, J., in Tait vs. New York Life Insurance Co., (Circuit Court United States, Western District of Tennessee) is entitled to no weight, being based on the *false* assumption "that the keeping alive of such a contract is beneficial to the public enemy," which is of no force *even if true*, unless contract *was made* during the war, which this was not. The contract was in force between the parties and both were bound by it according to its terms, for more than 9 years before the commencement of the war, and it did not depend upon accidents for its continued existence. As to what is public policy or political duty, in such a case, is

utterly irrelevant, and neither could be validly exercised either to "keep alive" or destroy such a contract.

The case in 44 Georgia, 119 (Dillard vs. Manhattan Life Insurance Company) is so intrinsically weak as hardly to require discussion. After saying "were this a case of forfeiture for a failure (to perform the condition of paying the premium to the company during the war) we should hold that a forfeiture was presented by the illegality of the performance of the condition,"—it yet concludes that *because* it was not thus illegally performed the policy was forfeited, on the singular ground that it was a condition precedent, and having become illegal (in the condition) the right never vested. Now it is plain that the condition "to pay the premium" never became illegal—and if its performance was legally delayed by the fact of war, the "condition" is in no wise affected thereby, and the result is the same as if the premium had been paid on the day it was due.

We reply to it especially by the cases of Cohen vs. the New York Mutual Life Insurance Company, 50 N. Y., 610; and Semmes vs. Hartford Insurance Company (this court), 13 Wallace, 158. And it is very evident that the Georgia Court did not comprehend the case as to the true and real points involved. On the *third* point—as to whether the agency of Brown was revoked by the war—for it is not pretended that it was otherwise revoked, at the time

payment of premium was tendered—the authorities are uniform that agency is not so revoked. In no case could there be such revocation if the appointment was made previous to the war—as in this case. "And to this effect are all of the authorities." Says Judge David Davis, delivering the opinion of this Court, in United States vs. Grossmayer, 9 Wallace, 72.

See also the following cases to the same effect:

Smith vs. Charter Oak Life Insurance Company. Cent'l Law Journal, vol. 1, No. 7, page 76.

Sands vs. New York Life Insurance Company, 50 N. Y., 626.

Hamilton vs. New York Mutual Life Insurance Company, 9 Blatch. 234.

Manhattan Life Insurance Company vs. Warwick, 20 Grattan, (Va.) 614.

New York Life Insurance Company vs. Clopton, 7 Bush, (Ky.) 179.

Ward vs. Smith, 7 Wallace, 447–452.

The agent *might lawfully receive premiums* on policies in force before the war, and such the *insured might lawfully pay.*

Manhattan Life Insurance Company vs. Warwick, 20 Grattan, 614.

Sands vs. New York Life Insurance Company, 50 New York, 626.

A tender to such an agent and his refusal to receive the premium * * would save a forfeiture of the policy.

Hamilton vs. Mutual Life Insurance Company, 9 Blatch 234..

It fully appears from the evidence in the record, that Statham's death was from a cause against which his life was insured by appellant—and that he did not travel beyond the geographic limits specified in the policy—and that the premiums were to be paid to the Company's local agent, (Brown), in Grenada, and were so paid and received for nearly ten years; and that the premium due on 8th December, 1861, was offered to be paid to said agent, (Brown.)

The evidence of Franklin, the President of appellant, shows no facts tending to show revocation or even suspension of agency—but mainly his own interested and unlearned opinions of the legal effect of certain acts and omissions.

N. C. SNIDER AND
JAS. F. MISTER,
Solicitors for Appellees.

Clinton Rice,
of Counsel. &c